SUBCHAPTER B—REGULATIONS UNDER THE FEDERAL POWER ACT

PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATION OF PROJECT COSTS

Subpart A—Determination of Cost of Projects Constructed Under License

Subpart B—Determination of Fair Value of Constructed Projects, Under Section 23(a) of the Act

Subpart C—Determination of Cost of Constructed Projects not Subject to Section 23(a) of the Act

Subpart D—Application for Preliminary Permit, License or Exemption: General Provisions

Subpart E—Application for License for Major Unconstructed Project and Major Modified Project

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Subpart I—Application for Preliminary Permit; Amendment and Cancellation of Preliminary Permit

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Subpart K—Exemption of Small Hydroelectric Power Projects of 5 Megawatts or Less

Subpart L—Application for Amendment of License

Subpart M—Fees Under Section 30(e) of the Act

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 42 U.S.C. 7101–7352.

SOURCE: Order 141, 12 FR 8485, Dec. 19, 1947, unless otherwise noted.

Subpart A—Determination of Cost of Projects Constructed Under License

§ 4.1 Initial cost statement.

(a) *Notification of Commission.* When a project is constructed under a license issued under the Federal Power Act, the licensee shall, within one year after the original project is ready for service, file with the Commission a letter, in quadruplicate, declaring that the original costs have been booked in compliance with the Commission's Uniform System of Accounts and the books of accounts are ready for audit.

(b) *Licensee's books.* The licensee's books of accounts for each project shall be maintained in such a fashion that each year's additions, betterments, and delections to the project may be readily ascertained.

(c) *Availability of information to the public.* The information made available to the Commission in accordance with this section must be available to the public for inspection and copying when specifically requested.

(d) *Compliance with the Act.* Compliance with the provisions of this section satisfies the filing requirements of section 4(b) of the Federal Power Act (16 U.S.C. 797(b)).

[Order 53, 44 FR 61948, Oct. 29, 1979]

§ 4.3 Report on project cost.

(a) *Scheduling an audit.* When the original cost declaration letter, filed in accordance with § 4.1 is received by the Commission, its representative will schedule and conduct an audit of the books, cost records, engineering reports, and other records supporting the project's original cost. The audit may include an inspection of the project works.

(b) *Project records.* The cost records shall be supported by memorandum accounts reflecting the indirect and overhead costs prior to their spread to primary accounts as well as all the details of allocations including formulas utilized to spread the indirect and overhead costs to primary accounts.

(c) *Report by Commission staff.* Upon completion of the audit, a report will be prepared for the Commission setting forth the audit findings and recommendations with respect to the cost as claimed.

[Order 53, 44 FR 61948, Oct. 29, 1979]

§ 4.4 Service of report.

Copies of such report will be served by certified mail upon said licensees, and copies will also be sent to the State public service commission, or if the States has not regulatory agency, to the Governor of the State where such project is located, and to such other parties as the Commission shall prescribe, and the report will be made available for public inspection at the time of service upon the licensee.

(Administrative Procedure Act, 5 U.S.C. 551–557 (1976); Federal Power Act, as amended, 16 U.S.C. 291–628 (1976 & Supp. V 1981), Dept. of Energy Organization Act 42 U.S.C. 7101–7352 (Supp. V 1981); E.O. 12009, 3 CFR 142 (1978))

[Order 141, 12 FR 8485, Dec. 19, 1947, as amended by Order 344, 48 FR 49010, Oct. 24, 1983]

§ 4.5 Time for filing protest.

Thirty days after service thereof will be allowed to such licensee within which to file a protest to such reports. If no protest is filed within the time allowed, the Commission will issue such

order as may be appropriate. If a protest is filed, a public hearing will be ordered in accordance with subpart E of part 385 of this chapter.

[Order 141, 12 FR 8485, Dec. 19, 1947, as amended by Order 225, 47 FR 19056, May 3, 1982]

§ 4.6 Burden of proof.

The burden of proof to sustain each item of claimed cost shall be upon the licensee and only such items as are in the opinion of the Commission supported by satisfactory proof may be entered in the electric plant accounts of the licensee.

[Order 53, 44 FR 61948, Oct. 29, 1979]

§ 4.7 Findings.

(a) *Commission determination.* Final action by the Commission will be in the form of an order served upon all parties to the proceeding. One copy of the order will be furnished to the Secretary of Treasury by the Commission.

(b) *Adjustments to licensee's books.* The licensee's books of account for the project shall be adjusted to conform to the actual legitimate cost as revised by the order of the Commission. These adjustments and the project may be audited by Commission representatives, as scheduled.

[Order 53, 44 FR 61948, Oct. 29, 1979]

Subpart B—Determination of Fair Value of Constructed Projects, Under Section 23(a) of the Act

§ 4.10 Valuation data.

(a) *Notification of Commission.* In every case arising under section 23(a) of the Federal Power Act that requires the determination of the fair value of a project already constructed, the licensee shall, within six months after the date of issuance of a license, file with the Commission a letter, in quadruplicate.

(b) *Contents of letter.* The letter referred to in paragraph (a) shall contain a statement to the effect that an inventory and appraisal in detail, as of the effective date of the license, of all property subject thereto and to be so valued has been completed. The letter shall also include a statement to the effect that the actual legitimate original cost, or if not known, the estimated original cost, and accrued depreciation of the property, classified by prime accounts as prescribed in the Commission's Uniform System of Accounts, have been established.

(c) *Licensee's books.* The licensee's books of account for each project shall be maintained in such a fashion that each year's additions, betterments, and deletions to the projects may be readily ascertained.

(d) *Availability of information to the public.* The information made available to the Commission in accordance with this section must be available for inspection and copying by the public when specifically requested.

[Order 53, 44 FR 61948, Oct. 29, 1979]

§ 4.11 Reports.

Representatives of the Commission will inspect the project works, engineering reports, and other records of the project, check the inventory and make an appraisal of the property and an audit of the books, records, and accounts of the licensee relating to the property to be valued, and will prepare a report of their findings with respect to the inventory, appraisal, original cost, accrued depreciation, and fair value of the property.

§ 4.12 Service of report.

A copy of such report will be served by certified mail upon said licensee, and copies will also be sent to the State public service commission, or if the State has no regulatory agency, to the Governor of the State where such project is located. The report will be made available for public inspection at the time of service upon the licensee.

(Administrative Procedure Act, 5 U.S.C. 551–557 (1976); Federal Power Act, as amended, 16 U.S.C. 291–628 (1976 & Supp. V 1981), Dept. of Energy Organization Act 42 U.S.C. 7101–7352 (Supp. V 1981); E.O. 12009, 3 CFR 142 (1978))

[Order 141, 12 FR 8485, Dec. 19, 1947, as amended by Order 344, 48 FR 49010, Oct. 24, 1983]

§ 4.13 Time for filing protest.

Thirty days after service thereof will be allowed to the licensee within which to file a protest to such report.

§ 4.14 Hearing upon report.

(a) *Public hearing.* After the expiration of the time within which a protest may be filed, a public hearing will be ordered in accordance with subpart E of part 385 of this chapter.

(b) *Commission determination.* After the conclusion of the hearing, the Commission will make a finding of fair value, accompanied by an order which will be served upon the licensee and all parties to the proceeding. One copy of the order shall be furnished to the Secretary of the Treasury by the Commission.

(c) *Adjustment to licensee's books.* The licensee's books of account for the project shall be adjusted to conform to the fair value of the project as revised by the order of the Commission. These adjustments and the project may be audited by Commission representatives, as scheduled.

[Order 53, 44 FR 61949, Oct. 29, 1979, as amended by Order 225, 47 FR 19056, May 3, 1982]

Subpart C—Determination of Cost of Constructed Projects not Subject to Section 23(a) of the Act

§ 4.20 Initial statement.

(a) *Notification of Commission.* In all cases where licenses are issued for projects already constructed, but which are not subject to the provisions of section 23(a) of the Act (49 Stat. 846; 16 U.S.C. 816), the licensee shall, within 6 months after the date of issuance of license, file with the Commission a letter, in quadruplicate.

(b) *Contents of letter.* The letter referred to in paragraph (a) of this section shall contain a statement to the effect that an inventory in detail of all property included under the license, as of the effective date of such license, has been completed. The letter shall also include a statement to the effect that actual legitimate original cost, or if not known, the estimated original cost, and accrued depreciation of the property, classified by prime accounts as prescribed in the Commission's Uniform System of Accounts, have been established.

(c) *Licensee's books.* The licensee's books of account for each project shall be maintained in such a fashion that each year's additions, betterments, and deletions to the project may be readily ascertained.

(d) *Availability of information to the public.* The information made available to the Commission in accordance with this section must be available for inspection and copying by the public when specifically requested.

(e) *Compliance with the Act.* Compliance with the provisions of this section satisfies the filing requirements of section 4(b) of the Federal Power Act (16 U.S.C. 797(b)).

[Order 53, 44 FR 61949, Oct. 29, 1979]

§ 4.21 Reports.

Representatives of the Commission will inspect the project works, engineering reports, and other records of the project, check the inventory and estimated depreciation, make an audit of the books, records, and accounts of the licensee relating to the property under license, and prepare a report of their findings with respect to the inventory, the original cost of the property, and the estimated accrued depreciation thereon.

§ 4.22 Service of report.

Copies of such report will be served by certified mail upon said licensees, and copies will also be sent to the State public service commission, or if the State has no regulatory agency, to the Governor of the State where such project is located, and to such other parties as the Commission shall prescribe, and the report will be made available for public inspection at the time of service upon the licensee.

(Administrative Procedure Act, 5 U.S.C. 551–557 (1976); Federal Power Act, as amended, 16 U.S.C. 291–628 (1976 & Supp. V 1981), Dept. of Energy Organization Act 42 U.S.C. 7101–7352 (Supp. V 1981); E.O. 12009, 3 CFR 142 (1978))

[Order 141, 12 FR 8485, Dec. 19, 1947, as amended by Order 344, 48 FR 49010, Oct. 24, 1983]

§ 4.23 Time for filing protest.

Thirty days after service thereof will be allowed to such licensee within which to file a protest to such reports. If no protest is filed within the time allowed, the Commission will issue such order as may be appropriate. If a protest is filed, a public hearing will be ordered in accordance with subpart E of part 385 of this chapter.

[Order 141, 12 FR 8485, Dec. 19, 1947, as amended by Order 225, 47 FR 19056, May 3, 1982]

§ 4.24 Determination of cost.

The Commission, after receipt of the reports, or after the conclusion of the hearing if one is held, will determine the amounts to be included in the electric plant accounts of the licensee as the cost of the property and the accrued depreciation thereon.

§ 4.25 Findings.

(a) *Commission determination.* Final action by the Commission will be in the form of an order served upon all parties to the proceeding. One copy of the order shall be furnished to the Secretary of Treasury by the Commission.

(b) *Adjustment to licensee's books.* The licensee's books of account for the project shall be adjusted to conform to the actual legitimate cost as revised by the order of the Commission. These adjustments and the project may be audited by Commission representatives, as scheduled.

[Order 53, 44 FR 61949, Oct. 29, 1979]

Subpart D—Application for Preliminary Permit, License or Exemption: General Provisions

AUTHORITY: Federal Power Act, as amended, 16 U.S.C. 792–828c; Department of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009, 42 FR 46267; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*).

§ 4.30 Applicability and definitions.

(a) (1) This subpart applies to applications for preliminary permit, license, or exemption from licensing.

(2) Any potential applicant for an original license for which prefiling consultation begins on or after July 23, 2005 and which wishes to develop and file its application pursuant to this part, must seek Commission authorization to do so pursuant to the provisions of part 5 of this chapter.

(b) For the purposes of this part—

(1)(i) *Competing development application* means any application for a license or exemption from licensing for a proposed water power project that would develop, conserve, and utilize, in whole or in part, the same or mutually exclusive water resources that would be developed, conserved, and utilized by a proposed water power project for which an initial preliminary permit or initial development application has been filed and is pending before the Commission.

(ii) *Competing preliminary permit application* means any application for a preliminary permit for a proposed water power project that would develop, conserve, and utilize, in whole or in part, the same or mutually exclusive water resources that would be developed, conserved and utilized by a proposed water power project for which an initial preliminary permit or initial development application has been filed and is pending before the Commission.

(2) *Conduit* means any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. The term *not primarily for the generation of electricity* includes but is not limited to a conduit:

(i) Which was built for the distribution of water for agricultural, municipal, or industrial consumption and is operated for such a purpose; and

(ii) To which a hydroelectric facility has been or is proposed to be added.

(3) *Construction of a dam,* for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility, means any construction, repair, reconstruction, or modification of a dam that creates a new impoundment or increases the normal maximum surface elevation or the normal maximum surface area of an existing impoundment.

(4)(i) *Dam,* for the purposes of provisions governing application for license

of a major project—existing dam, means any structure for impounding or diverting water.

(ii) *Dam*, for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility, means any structure that impounds water.

(iii) *Dam*, for the purposes of provisions governing application for exemption of a small hydroelectric power project, means any structure for impounding water, including any diversion structure that is designed to obstruct all or substantially all of the flow of a natural body of water.

(5) *Development application* means any application for either a license or exemption from licensing for a proposed water power project.

(6)(i) *Existing dam*, for the purposes of provisions governing application for license of a major project—existing dam, means any dam (as defined in paragraph (b)(4)(i) of this section) that has already been constructed and which does not require any construction or enlargement of impoundment structures other than repairs or reconstruction.

(ii) *Existing dam*, for the purposes of provisions governing application for exemption of a small hydroelectric power project, means any dam, the construction of which was completed on or before April 20, 1977, and which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installation of any small hydroelectric power project.

(7) *Existing impoundment*, for the purposes of provisions governing application for license of a major project—existing dam, means any body of water that an existing dam impounds.

(8) *Federal lands*, for the purposes of provisions governing application for exemption of a small hydroelectric power project, means any lands to which the United States holds fee title.

(9)(i) *Fish and wildlife agencies* means the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency in charge of administrative management over fish and wildlife resources of the state in which a proposed hydropower project is located.

(ii) *Fish and wildlife recommendation* means any recommendation designed to protect, mitigate damages to, or enhance any wild member of the animal kingdom, including any migratory or nonmigratory mammal, fish, bird, amphibian, reptile, mollusk, crustacean, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any egg or offspring thereof, related breeding or spawning grounds, and habitat. A ''fish and wildlife recommendation'' includes a request for a study which cannot be completed prior to licensing, but does not include a request that the proposed project not be constructed or operated, a request for additional pre-licensing studies or analysis or, as the term is used in §§ 4.34(e)(1) and 4.34(f)(3), a recommendation for facilities, programs, or other measures to benefit recreation or tourism.

(10) *Indian tribe* means, in reference to a proposal to apply for a license or exemption for a hydropower project, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal governments in the FEDERAL REGISTER in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the development and operation of the hydropower project proposed (as where the operation of the proposed project could interfere with the management and harvest of anadromous fish or where the project works would be located within the tribe's reservation).

(11)(i) *Initial development application* means any acceptable application for either a license or exemption from licensing for a proposed water power project that would develop, conserve, and utilize, in whole or in part, water resources for which no other acceptable application for a license or exemption from licensing has been submitted for filing and is pending before the Commission.

(ii) *Initial preliminary permit application* means any acceptable application for a preliminary permit for a proposed water power project that would develop, conserve, and utilize, in whole or

in part, water resources for which no other acceptable preliminary permit application has been submitted for filing and is pending before the Commission.

(12) *Install or increase*, for the purposes of provisions governing application for exemption of a small hydroelectric power project, means to add new generating capacity at a site that has no existing generating units, to replace or rehabilitate an abandoned or unused existing generating unit, or to increase the generating capacity of any existing power plant by installing an additional generating unit or by rehabilitating an operable generating unit in a way that increases its rated electric power output.

(13) *Licensed water power project* means a project, as defined in section 3(11) of the Federal Power Act, that is licensed under Part I of the Federal Power Act.

(14) *Major modified project* means any major project—existing dam, as defined in paragraph (b)(16) of this section, that would include:

(i) Any repair, modification or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or the normal maximum surface elevation of an existing impoundment; or

(ii) Any change in existing project works or operations that would result in a significant environmental impact.

(15) *Major unconstructed project* means any unlicensed water power project that would:

(i) Have a total installed generating capacity of more than 1.5 MW; and

(ii) Use the water power potential of a dam and impoundment which, at the time application is filed, have not been constructed.

(16) *Major project—existing dam* means a licensed or unlicensed, existing or proposed water power project that would:

(i) Have a total installed generating capacity or more than 2,000 horsepower (1.5 MW); and

(ii) Not use the water power potential provided by any dam except an existing dam.

(17) *Minor water power project* means any licensed or unlicensed, existing or proposed water power project that would have a total installed generation capacity of 2,000 horsepower (1.5 MW), or less.

(18) *New development*, for the purposes of provisions governing application for license of a major project—existing dam, means any construction, installation, repair, reconstruction, or other change in the existing state of project works or appurtenant facilities, including any dredging and filling in project waters.

(19) *New license* means any license, except an annual license issued under section 15 of the Federal Power Act, for a water power project that is issued under the Federal Power Act after the initial license for that project.

(20)(i) *Non-Federal lands*, for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility, means any lands except lands to which the United States holds fee title.

(ii) *Non-Federal lands*, for the purposes of provisions governing application for exemption of a small hydroelectric power project, mean any lands other than Federal lands defined in paragraph (b)(8) of this section.

(21) *Person* means any individual and, as defined in section 3 of the Federal Power Act, any corporation, municipality, or state.

(22) *Project*, for the purposes of provisions governing application for exemption of a small hydroelectric power project, means:

(i) The impoundment and any associated dam, intake, water conveyance facility, power plant, primary transmission line, and other appurtenant facility if a lake or similar natural impoundment or a manmade impoundment is used for power generation; or

(ii) Any diversion structure other than a dam and any associated water conveyance facility, power plant, primary transmission line, and other appurtenant facility if a natural water feature other than a lake or similar natural impoundment is used for power generation.

(23) *Qualified exemption applicant* means any person who meets the requirements specified in §4.31(b)(2) with respect to a small hydroelectric power project for which exemption from licensing is sought.

(24) *Qualified license applicant* means any person to whom the Commission may issue a license, as specified in section 4(e) of the Federal Power Act.

(25) *Ready for environmental analysis* means the point in the processing of an application for an original or new license or exemption from licensing which has been accepted for filing, where substantially all additional information requested by the Commission has been filed and found adequate.

(26) *Real property interests*, for the purposes of provisions governing application for exemption of a small conduit hydroelectric facility or a small hydroelectric power project, includes ownership in fee, rights-of-way, easements, or leaseholds.

(27) *Resource agency* means a Federal, state, or interstate agency exercising administration over the areas of flood control, navigation, irrigation, recreation, fish and wildlife, water resource management (including water rights), or cultural or other relevant resources of the state or states in which a project is or will be located.

(28) *Small conduit hydroelectric facility* means an existing or proposed hydroelectric facility that is constructed, operated, or maintained for the generation of electric power, and includes all structures, fixtures, equipment, and lands used and useful in the operation or maintenance of the hydroelectric facility, but excludes the conduit on which the hydroelectric facility is located or the transmission lines associated with the hydroelectric facility and which:

(i) Utilizes for electric power generation the hydroelectric potential of a conduit;

(ii) Is located entirely on non-Federal lands, as defined in paragraph (b)(20)(i) of this section;

(iii) Has an installed generating capacity of 15 MW or less;

(iv) Is not an integral part of a dam;

(v) Discharges the water it uses for power generation either:

(A) Into a conduit;

(B) Directly to a point of agricultural, municipal, or industrial consumption; or

(C) Into a natural water body if a quantity of water equal to or greater than the quantity discharged from the hydroelectric facility is withdrawn from that water body downstream into a conduit that is part of the same water supply system as the conduit on which the hydroelectric facility is located; and

(vi) Does not rely upon construction of a dam, which construction will create any portion of the hydrostatic head that the facility uses for power generation unless that construction would occur for agricultural, municipal, or industrial consumptive purposes even if hydroelectric generating facilities were not installed.

(29) *Small hydroelectric power project* means any project in which capacity will be installed or increased after the date of notice of exemption or application under subpart K of this chapter, which will have a total installed capacity of not more than 5 MW, and which:

(i) Would utilize for electric power generation the water power potential of an existing dam that is not owned or operated by the United States or by an instrumentality of the Federal Government, including the Tennessee Valley Authority; or

(ii)(A) Would utilize for the generation of electricity a natural water feature, such as a natural lake, waterfall, or the gradient of a natural stream, without the need for a dam or man-made impoundment; and

(B) Would not retain water behind any structure for the purpose of a storage and release operation.

(30) *PURPA benefits* means benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). Section 210(a) of PURPA requires electric utilities to purchase electricity from, and to sell electricity to, qualifying facilities.

[Order 413, 50 FR 11676, Mar. 25, 1985, as amended by Order 487, 52 FR 48404, Dec. 22, 1987; Order 499, 53 FR 27001, July 18, 1988; Order 503, 53 FR 36567, Sept. 21, 1988; Order 533, 56 FR 23146, May 20, 1991; 56 FR 61154, Dec. 2, 1991; Order 533–A, 57 FR 10809, Mar. 31, 1992; 59 FR 10577, Mar. 7, 1994; Order 2002, 68 FR 51115, Aug. 25, 2003]

§ 4.31 Initial or competing application: who may file.

(a) *Application for a preliminary permit or a license.* Any citizen, association of citizens, domestic corporation, municipality, or state may submit for filing

an initial application or a competing application for a preliminary permit or a license for a water power project under Part I of the Federal Power Act.

(b) *Application for exemption of a small conduit hydroelectric facility*—(1) *Exemption from provisions other than licensing.* Any citizen, association of citizens, domestic corporation, municipality, or state that has all of the real property interests in the lands necessary to develop and operate that project, or an option to obtain those interests, may apply for exemption of a small conduit hydroelectric facility from provisions of Part I of the Federal Power Act, other than licensing provisions.

(2) *Exemption from licensing.* Any person having all the real property interests in the lands necessary to develop and operate the small conduit hydroelectric facility, or an option to obtain those interests, may apply for exemption of that facility from licensing under Part I of the Federal Power Act.

(c) *Application for case-specific exemption of a small hydroelectric power project*—(1) *Exemption from provisions other than licensing.* Any qualified license applicant or licensee seeking amendment of its license may apply for exemption of the related project from provisions of Part I of the Federal Power Act other than licensing provisions.

(2) *Exemption from licensing*—(i) *Only Federal lands involved.* If only rights to use or occupy Federal lands would be necessary to develop and operate the proposed small hydroelectric power project, any person may apply for exemption of that project from licensing.

(ii) *Some non-Federal lands involved.* If real property interests in any non-Federal lands would be necessary to develop and operate the proposed small hydroelectric power project, any person who has all of the real property interests in non-Federal lands necessary to develop and operate that project, or an option to obtain those interests, may apply for exemption of that project from licensing.

[Order 413, 50 FR 11678, Mar. 25, 1985]

§ 4.32 Acceptance for filing or rejection; information to be made available to the public; requests for additional studies.

(a) Each application must:

(1) For a preliminary permit or license, identify every person, citizen, association of citizens, domestic corporation, municipality, or state that has or intends to obtain and will maintain any proprietary right necessary to construct, operate, or maintain the project;

(2) For a preliminary permit or a license, identify (providing names and mailing addresses):

(i) Every county in which any part of the project, and any Federal facilities that would be used by the project, would be located;

(ii) Every city, town, or similar local political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That has a population of 5,000 or more people and is located within 15 miles of the project dam;

(iii) Every irrigation district, drainage district, or similar special purpose political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That owns, operates, maintains, or uses any project facilities or any Federal facilities that would be used by the project;

(iv) Every other political subdivision in the general area of the project that there is reason to believe would likely be interested in, or affected by, the application; and

(v) All Indian tribes that may be affected by the project.

(3)(i) For a license (other than a license under section 15 of the Federal Power Act) state that the applicant has made, either at the time of or before filing the application, a good faith effort to give notification by certified mail of the filing of the application to:

(A) Every property owner of record of any interest in the property within the bounds of the project, or in the case of the project without a specific boundary, each such owner of property which

would underlie or be adjacent to any project works including any impoundments; and

(B) The entities identified in paragraph (a)(2) of this section, as well as any other Federal, state, municipal or other local government agencies that there is reason to believe would likely be interested in or affected by such application.

(ii) Such notification must contain the name, business address, and telephone number of the applicant and a copy of the Exhibit G contained in the application, and must state that a license application is being filed with the Commission.

(4)(i) As to any facts alleged in the application or other materials filed, be subscribed and verified under oath in the form set forth in paragraph (a)(3)(ii) of this section by the person filing, an officer thereof, or other person having knowledge of the matters sent forth. If the subscription and verification is by anyone other than the person filing or an officer thereof, it shall include a statement of the reasons therefor.

(ii) This (application, etc.) is executed in the

State of _____

County of _____

by:_____

(Name)_____ _____

(Address) _____

being duly sworn, depose(s) and say(s) that the contents of this (application, etc.) are true to the best of (his or her) knowledge or belief. The undersigned applicant(s) has (have) signed the (application, etc.) this _____ day of _____, 19____.

_____

(Applicant(s))

By: _____

Subscribed and sworn to before me, a [Notary Public, or title of other official authorized by the state to notarize documents, as appropriate] of the State of _____ this day of _____, 19____.

/SEAL/ [if any]

_____

(Notary Public, or other authorized official)

(5) Contain the information and documents prescribed in the following sections of this chapter, according to the type of application:

(i) Preliminary permit: § 4.81;

(ii) License for a minor water power project and a major water power project 5 MW or less: § 4.61;

(iii) License for a major unconstructed project and a major modified project: § 4.41;

(iv) License for a major project—existing dam: § 4.51;

(v) License for a transmission line only: § 4.71;

(vi) Nonpower license for a licensed project: § 16.11;

(vii) Exemption of a small conduit hydroelectric facility: § 4.92;

(viii) Case-specific exemption of a small hydroelectric power project: § 4.107; or

(ix) License or exemption for a project located at a new dam or diversion where the applicant seeks PURPA benefits: § 292.208.

(b) (1) Each applicant for a preliminary permit, license, and transfer or surrender of license and each petitioner for surrender of an exemption must submit to the Commission's Secretary for filing an original and eight copies of the application or petition. The applicant or petitioner must serve one copy of the application or petition on the Director of the Commission's Regional Office for the appropriate region and on each resource agency, Indian tribe, and member of the public consulted pursuant to § 4.38 or § 16.8 of this chapter or part 5 of this chapter. In the case of an application for a preliminary permit, the applicant must, if the Commission so directs, serve copies of the application on the U.S. Department of the Interior and the U.S. Army Corps of Engineers. The application may include reduced prints of maps and drawings conforming to § 4.39(d). The originals (microfilm) of maps and drawings are not to be filed initially, but will be required pursuant to paragraph (d) of this section. The Commission may also ask for the filing of full-sized prints in appropriate cases.

(2) Each applicant for exemption must submit to the Commission's Secretary for filing an original and eight copies of the application. An applicant must serve one copy of the application on the Director of the Commission's

Regional Office for the appropriate region and on each resource agency consulted pursuant to §4.38. For each application filed following October 23, 2003, maps and drawings must conform to the requirements of §4.39. The originals (microfilm) of maps and drawing are not to be filed initially, but will be requested pursuant to paragraph (d) of this section.

(3)(i) An applicant must make information regarding its proposed project reasonably available to the public for inspection and reproduction, from the date on which the applicant files its application for a license or exemption until the licensing or exemption proceeding for the project is terminated by the Commission. This information includes a copy of the complete application for license or exemption, together with all exhibits, appendices and any amendments, and any comments, pleadings, supplementary or additional information, or correspondence filed by the applicant with the Commission in connection with the application.

(ii) An applicant must delete from any information made available to the public under this section, specific site or property locations the disclosure of which would create a risk of harm, theft, or destruction of archeological or Native American cultural resources or to the site at which the sources are located, or would violate any federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470w–3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh.

(4)(i) An applicant must make available the information specified in paragraph (b)(3) of this section in a form that is readily accessible, reviewable, and reproducible, at the same time as the information is filed with the Commission or required by regulation to be made available.

(ii) An applicant must make the information specified in paragraph (b)(3) of this section available to the public for inspection:

(A) At its principal place of business or at any other location that is more accessible to the public, provided that all the information is available in at least one location;

(B) During regular business hours; and

(C) In a form that is readily accessible, reviewable and reproducible.

(iii) The applicant must provide a copy of the complete application (as amended) to a public library or other convenient public office located in each county in which the proposed project is located.

(iv) An applicant must make requested copies of the information specified in paragraph (b)(3) of this section available either:

(A) At its principal place of business or at any other location that is more accessible to the public, after obtaining reimbursement for reasonable costs of reproduction; or

(B) Through the mail, after obtaining reimbursement for postage fees and reasonable costs of reproduction.

(5) Anyone may file a petition with the Commission requesting access to the information specified in paragraph (b)(3) of this section if it believes that an applicant is not making the information reasonably available for public inspection or reproduction. The petition must describe in detail the basis for the petitioner's belief.

(6) An applicant must publish notice twice of the filing of its application, no later than 14 days after the filing date, in a daily or weekly newspaper of general circulation in each county in which the project is located. The notice must disclose the filing date of the application and briefly summarize it, including the applicant's name and address, the type of facility applied for, its proposed location, the places where the information specified in paragraph (b)(3) of this section is available for inspection and reproduction, and the date by which any requests for additional scientific studies are due under paragraph (b)(7) of this section, and must state that the Commission will publish subsequent notices soliciting public participation if the application is found acceptable for filing. The applicant must promptly provide the Commission with proof of the publications of this notice.

(7) If any resource agency, Indian tribe, or person believes that an additional scientific study should be conducted in order to form an adequate

factual basis for a complete analysis of the application on its merits, the resource agency, Indian tribe, or person must file a request for the study with the Commission not later than 60 days after the application is filed and serve a copy of the request on the applicant. The Commission will issue public notice of the tendering for filing of each application for hydropower license or exemption; each such applicant must submit a draft of this notice to the Commission with its application. For any such additional study request, the requester must describe the recommended study and the basis for the request in detail, including who should conduct and participate in the study, its methodology and objectives, whether the recommended study methods are generally accepted in the Scientific community, how the study and information sought will be useful in furthering the resource goals that are affected by the proposed facilities, and approximately how long the study will take to complete, and must explain why the study objectives cannot be achieved using the data already available. In addition, in the case of a study request by a resource agency or Indian tribe that had failed to request the study during the pre-filing consultation process under § 4.38 of this part or § 16.8 of this chapter, the agency or Indian tribe must explain why this request was not made during the pre-filing consultation process and show good cause why its request for the study should be considered by the Commission.

(8) An applicant may file a response to any such study request within 30 days of its filing, serving a copy of the response on the requester.

(9) The requirements of paragraphs (b)(3) to (b)(8) of this section only apply to an application for license or exemption filed on or after May 20, 1991. Paragraphs (b)(3) and (b)(4) of this section do not apply to applications subject to the requirements of § 16.7 of this chapter.

(c)(1) Every application for a licensee or exemption for a project with a capacity of 80 megawatts or less must include in its application copies of the statements made under § 4.38(b)(1)(vi).

(2) If an applicant reverses a statement of intent not to seek PURPA benefits:

(i) Prior to the Commission issuing a license or exemption, the reversal of intent will be treated as an amendment of the application under § 4.35 and the applicant must:

(A) Repeat the pre-filing consultation process under § 4.38; and

(B) Satisfy all the requirements in § 292.208 of this chapter; or

(ii) After the Commission issues a license or exemption for the project, the applicant is prohibited from obtaining PURPA benefits.

(d) When any application is found to conform to the requirements of paragraphs (a), (b) and (c) of this section, the Commission or its delegate will:

(1) Notify the applicant that the application has been accepted for filing, specifying the project number assigned and the date upon which the application was accepted for filing, and, for a license or exemption application, direct the filing of the originals (microfilm) of required maps and drawings;

(2)(i) For an application for a preliminary permit or a license, issue public notice of the application as required in the Federal Power Act;

(ii) For an application for exemption from licensing, publish notice once in a daily or weekly newspaper of general circulation in each county in which the project is or will be located; and

(3) If the project affects lands of the United States, notify the appropriate Federal office of the application and the specific lands affected, pursuant to section 24 of the Federal Power Act.

(4) For an application for a license seeking benefits under section 210 of the Public Utility Regulatory Policies Act of 1978, as amended, for a project that would be located at a new dam or diversion, serve the public notice issued for the application under paragraph (d)(2)(i) of this section to interested agencies at the time the applicant is notified that the application is accepted for filing.

(e) In order for an application to conform adequately to the requirements of paragraphs (a), (b) and (c) of this section and of § 4.38, an application must be completed fully. No blanks should be left in the application. No material

or information required in the application should be omitted. If an applicant believes that its application conforms adequately without containing certain required material or information, it must explain in detail why the material or information is not being submitted and what steps were taken by the applicant to provide the material or information. If the Commission finds that an application does not adequately conform to the requirements of paragraphs (a), (b) and (c) of this section and of §4.38, the Commission or its designee will consider the application either deficient or patently deficient.

(1) *Deficient applications.* (i) An application that in the judgment of the Director of the Office of Energy Projects does not conform to the requirements of paragraphs (a), (b) and (c) of this section and of §4.38, may be considered deficient. An applicant having a deficient application will be afforded additional time to correct deficiencies, not to exceed 45 days from the date of notification in the case of an application for a preliminary permit or exemption from licensing or 90 days from the date of notification in the case of an application for license. Notification will be by letter or, in the case of minor deficiencies, by telephone. Any notification will specify the deficiencies to be corrected. Deficiencies must be corrected by submitting an original and the number of copies specified in paragraph (b) of this section of the specified materials or information to the Secretary within the time specified in the notification of deficiency.

(ii) Upon submission of a conforming application, action will be taken in accordance with paragraph (d) of this section.

(iii) If the revised application is found not to conform to the requirements of paragraphs (a), (b) and (c) of this section and of §4.38, or if the revisions are not timely submitted, the revised application will be rejected. Procedures for rejected applications are specified in paragraph (e)(2)(iii).

(2) *Patently deficient applications.* (i) If, within 90 days of its filing date, the Director of the Office of Energy Projects determines that an application patently fails to substantially comply with the requirements of paragraph (a), (b), and (c) of this section and of §4.38 of this part or §16.8 of this chapter, or is for a project that is precluded by law, the application will be rejected as patently deficient with the specification of the deficiencies that render the application patently deficient.

(ii) If, after 90 days of its filing date, the Director of the Office of Energy Projects determines that an application patently fails to substantially comply with the requirements of paragraphs (a), (b), and (c) of this section and of §4.38 of this part or §16.8 of this chapter, or is for a project that is precluded by law:

(A) The application will be rejected by order of the Commission, if the Commission determines it is patently deficient; or

(B) The application will be considered deficient under paragraph (e)(1) of this section, if the Commission determines it is not patently deficient.

(iii) Any application that is rejected may be resubmitted if the deficiencies are corrected and if, in the case of a competing application, the resubmittal is timely. The date the rejected application is resubmitted will be considered the new filing date for purposes of determining its timeliness under §4.36 and the disposition of competing applications under §4.37.

(f) Any application will be considered *accepted for filing* as of the application filing date if the Secretary receives all of the information and documents necessary to conform to the requirements of paragraphs (a), (b) and (c) of this section and of §4.38 within the time prescribed by the Commission or its delegate under paragraph (e) of this section.

(g) An applicant may be required to submit any additional information or documents that the Commission or its designee considers relevant for an informed decision on the application. The information or documents must take the form, and must be submitted within the time, that the Commission or its designee prescribes. An applicant may also be required to provide within a specified time additional copies of the complete application, or any of the additional information or documents that are filed, to the Commission or to

any person, agency, or other entity that the Commission or its designee specifies. If an applicant fails to provide timely additional information, documents, or copies of submitted materials as required, the Commission or its designee may dismiss the application, hold it in abeyance, or take other appropriate action under this chapter or the Federal Power Act.

(h) A prospective applicant, prior to submitting its application for filing, may seek advice from the Commission staff regarding the sufficiency of the application. For this purpose, five copies of the draft application should be submitted to the Director of the Division of Hydropower, Environment and Engineering. An applicant or prospective applicant may confer with the Commission staff at any time regarding deficiencies or other matters related to its application. All conferences are subject to the requirements of §385.2201 of this chapter governing ex parte communications. The opinions or advice of the staff will not bind the Commission or any person delegated authority to act on its behalf.

(i) Intervention in any preliminary permit proceeding will not constitute intervention in any subsequent licensing or exemption proceeding.

(j) Any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected.

(k) *Critical Energy Infrastructure Information.* (1) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined in §388.113(c) of this chapter, to any person, the applicant shall omit the CEII from the information made available and insert the following in its place:

(i) A statement that CEII is being withheld;

(ii) A brief description of the omitted information that does not reveal any CEII; and

(iii) This statement: ''Procedures for obtaining access to Critical Energy Infrastructure Information (CEII) may be found at 18 CFR 388.113. Requests for access to CEII should be made to the Commission's CEII Coordinator.''

(2) The applicant, in determining whether information constitutes CEII, shall treat the information in a manner consistent with any filings that applicant has made with the Commission and shall to the extent practicable adhere to any previous determinations by the Commission or the CEII Coordinator involving the same or like information.

(3) The procedures contained in §§388.112 and 388.113 of this chapter regarding designation of, and access to, CEII, shall apply in the event of a challenge to a CEII designation or a request for access to CEII. If it is determined that information is not CEII or that a requester should be granted access to CEII, the applicant will be directed to make the information available to the requester.

(4) Nothing in this section shall be construed to prohibit any persons from voluntarily reaching arrangements or agreements calling for the disclosure of CEII.

[Order 413, 50 FR 11678, Mar. 25, 1985, as amended by Order 480, 52 FR 37285, Oct. 6, 1987; Order 487, 52 FR 48404, Dec. 22, 1987; Order 499, 53 FR 27001, July 18, 1988; Order 533, 56 FR 23147, May 20, 1991; 56 FR 61155, Dec. 2, 1991; Order 540, 57 FR 21737, May 22, 1992; Order 2002, 68 FR 51115, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003]

§ 4.33 Limitations on submitting applications.

(a) *Limitations on submission and acceptance of a preliminary permit application.* The Commission will not accept an application for a preliminary permit for project works that:

(1) Would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which there is an unexpired preliminary permit.

(2) Would interfere with a licensed project in a manner that, absent the licensee's consent, would be precluded by Section 6 of the Federal Power Act.

(3) Would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which an initial development application has been filed unless the preliminary permit application is filed not later than the time allowed

under §4.36(a) for the filing of applications in competition against an initial application for a preliminary permit that would develop, conserve, and utilize, in whole or in part, the same resources.

(b) *Limitations on submissions and acceptance of a license application.* The Commission will not accept an application for a license or project works that would develop, conserve, or utilize, in whole or part, the same water resources that would be developed, conserved, and utilized by a project for which there is:

(1) An unexpired preliminary permit, unless the permittee has submitted an application for license; or

(2) An unexpired license, as provided for in Section 15 of the Federal Power Act.

(c) *Limitations on submission and acceptance of an application for a license that would affect an exempted project.* (1) Except as permitted under §4.33(c)(2), §4.94(d), or §4.106 (c), (e) or (f), the Commission will not accept an application for a license for project works that are already exempted from licensing under this part.

(2) If a project is exempted from licensing pursuant to §4.103 or §4.109 and real property interests in any non-Federal lands would be necessary to develop or operate the project, any person who is both a qualified license applicant and has any of those real property interests in non-Federal lands may submit a license application for that project. If a license application is submitted under this clause, any other qualified license applicant may submit a competing license application in accordance with §4.36.

(d) *Limitations on submission and acceptance of exemption applications*—(1) *Unexpired permit or license.* (i) If there is an unexpired permit in effect for a project, the Commission will accept an application for exemption of that project from licensing only if the exemption applicant is the permittee. Upon acceptance for filing of the permittee's application, the permit will be considered to have expired.

(ii) If there is an unexpired license in effect for a project, the Commission will accept an application for exemption of that project from licensing only if the exemption applicant is the licensee.

(2) *Pending license applications.* If an accepted license application for a project was submitted by a permittee before the preliminary permit expired, the Commission will not accept an application for exemption of that project from licensing submitted by a person other than the former permittee.

(3) *Submitted by qualified exemption applicant.* If the first accepted license application for a project was filed by a qualified exemption applicant, the applicant may request that its license application be treated initially as an application for exemption from licensing by so notifying the Commission in writing and, unless only rights to use or occupy Federal lands would be necessary to develop and operate the project, by submitting documentary evidence showing that the applicant holds the real property interests required under §4.31. Such notice and documentation must be submitted not later than the last date for filing protests or motions to intervene prescribed in the public notice issued for its license application under §4.32(d)(2).

(e) *Priority of exemption applicant's earlier permit or license application.* Any accepted preliminary permit or license application submitted by a person who later applies for exemption of the project from licensing will retain its validity and priority under this subpart until the preliminary permit or license application is withdrawn or the project is exempted from licensing.

[Order 413, 50 FR 11680, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988; Order 2002, 68 FR 51116, Aug. 25, 2003]

§4.34 Hearings on applications; consultation on terms and conditions; motions to intervene; alternative procedures.

(a) *Trial-type hearing.* The Commission may order a trial-type hearing on an application for a preliminary permit, a license, or an exemption from licensing upon either its own motion or the motion of any interested party of record. Any trial-type hearing will be limited to the issues prescribed by order of the Commission. In all other cases the hearings will be conducted by notice and comment procedures.

(b) *Notice and comment hearings.* All comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis. All reply comments must be filed within 105 days of that notice. All comments and reply comments and all other filings described in this section must be served on all persons listed in the service list prepared by the Commission, in accordance with the requirements of § 385.2010 of this chapter. If a party or interceder (as defined in § 385.2201 of this Chapter) submits any written material to the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, the party or interceder must also serve a copy of the submission on this resource agency. The Commission may allow for longer comment or reply comment periods if appropriate. A commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with § 385.2008 of this chapter. Late-filed fish and wildlife recommendations will not be subject to the requirements of paragraphs (e), (f)(1)(ii), and (f)(3) of this section, and late-filed terms and conditions or prescriptions will not be subject to the requirements of paragraphs (f)(1)(iv), (f)(1)(v), and (f)(2) of this section. Late-filed fish and wildlife recommendations, terms and conditions, or prescriptions will be considered by the Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

(1) *Agencies responsible for mandatory terms and conditions and presentations.* Any agency responsible for mandatory terms and conditions or prescriptions for licenses or exemptions, pursuant to sections 4(e), 18, and 30(c) of the Federal Power Act and section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, must provide these terms and conditions or prescriptions in its initial comments filed with the Commission pursuant to paragraph (b) of this section. In those comments, the agency must specifically identify and explain the mandatory terms and conditions or prescriptions and their evidentiary and legal basis. In the case of an application prepared other than pursuant to part 5 of this chapter, if ongoing agency proceedings to determine the terms and conditions or prescriptions are not completed by the date specified, the agency must submit to the Commission by the due date:

(i) Preliminary terms and conditions or prescriptions and a schedule showing the status of the agency proceedings and when the terms and conditions or prescriptions are expected to become final; or

(ii) A statement waiving the agency's right to file the terms and conditions or prescriptions or indicating the agency does not intend to file terms and conditions or prescriptions.

(2) *Fish and Wildlife agencies and Indian tribes.* All fish and wildlife agencies must set forth any recommended terms and conditions for the protection, mitigation of damages to, or enhancement of fish and wildlife, pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act, in their initial comments filed with the Commission by the date specified in paragraph (b) of this section. All Indian tribes must submit recommendations (including fish and wildlife recommendations) by the same date. In those comments, a fish and wildlife agency or Indian tribe must discuss its understanding of the resource issues presented by the proposed facilities and the evidentiary basis for the recommended terms and conditions.

(3) *Other Government agencies and members of the public.* Resource agencies, other governmental units, and members of the public must file their recommendations in their initial comments by the date specified in paragraph (b) of this section. The comments must clearly identify all recommendations and present their evidentiary basis.

(4) *Submittal of modified recommendations, terms and conditions or prescriptions.* (i) If the information and analysis (including reasonable alternatives)

presented in a draft environmental document, issued for comment by the Commission, indicate a need to modify the recommendations or terms and conditions or prescriptions previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section, the agency, Indian tribe, or member of the public must file with the Commission any modified recommendations or terms and conditions or prescriptions on the proposed project (and reasonable alternatives) no later than the due date for comments on the draft environmental impact statement. Modified recommendations or terms and conditions or prescriptions must be clearly distinguished from comments on the draft document.

(ii) If an applicant files an amendment to its application that would materially change the project's proposed plans of development, as provided in §4.35, an agency, Indian tribe or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section no later than the due date specified by the Commission for comments on the amendment.

(5)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (b)(5)(ii) of this section.

(ii) In the case of an application process using the alternative procedures of paragraph 4.34(i), the filing requirement of paragraph (b)(5)(i) shall apply upon issuance of notice the Commission has accepted the application as provided for in paragraph 4.32(d) of this part.

(iii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(iv) Notwithstanding any other provision in title 18, chapter I, subchapter B, part 4, any application to amend an existing license, and any application to amend a pending application for a license, requires a new request for water quality certification pursuant to paragraph (b)(5)(i) of this section if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

(c) *Additional procedures.* If necessary or appropriate the Commission may require additional procedures (*e.g.*, a prehearing conference, further notice and comment on specific issues or oral argument). A party may request additional procedures in a motion that clearly and specifically sets forth the procedures requested and the basis for the request. Replies to such requests may be filed within 15 days of the request.

(d) *Consultation procedures.* Pursuant to the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, as amended, the Commission will coordinate as appropriate with other government agencies responsible for mandatory terms and conditions for exemptions and licenses for hydropower projects. Pursuant to the Federal Power Act and the Fish and Wildlife Coordination Act, the Commission will consult with fish and wildlife agencies concerning the impact of a hydropower proposal on fish and wildlife and appropriate terms and conditions for license to adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat). Pursuant to the Federal Power Act and the Endangered Species Act, the Commission will consult with the U.S. Fish and Wildlife Service or the National

Marine Fisheries Service, as appropriate, concerning the impact of a hydropower proposal on endangered or threatened species and their critical habitat.

(e) *Consultation on recommended fish and wildlife conditions; Section 10(j) process.* (1) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(2) The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis. The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission. If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental assessment. The preliminary determination, for any recommendations believed to be inconsistent, shall include an explanation why the Commission believes the recommendation is inconsistent with the Federal Power Act or other applicable law, including any supporting analysis and conclusions, and an explanation of how the measures recommended in the environmental document would adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(3) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency, including any modified recommendations, within the time frame allotted for comments on the draft environmental document or, if none, the time frame for comments on the environmental analysis. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference, or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(4) The Commission shall attempt, with the agencies, to reach a mutually acceptable resolution of any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency. If the Commission decides, or an affected resource agency requests, the Commission will conduct a meeting, telephone, or video conference, or other procedures to address issues raised by its preliminary determination of inconsistency and comments thereon. The Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 90 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this subsection to discuss section 10(j) issues, including any proposed resolutions and supporting analysis, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes.

(5) The section 10(j) process ends when the Commission issues an order granting or denying the license application in question. If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or

in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

(f) *Licenses and exemption conditions and required findings*—(1) *License conditions.* (i) All licenses shall be issued on the conditions specified in section 10 of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

(ii) Subject to paragraph (f)(3) of this section, fish and wildlife conditions shall be based on recommendations timely received from the fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.

(iii) The Commission will consider the timely recommendations of resource agencies, other governmental units, and members of the public, and the timely recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(iv) Licenses for a project located within any Federal reservation shall be issued only after the findings required by, and subject to any conditions that may be timely received pursuant to, section 4(e) of the Federal Power Act.

(v) The Commission will require the construction, maintenance, and operation by a licensee at its own expense of such fishways as may be timely prescribed by the Secretary of Commerce or the Secretary of the Interior, as appropriate, pursuant to section 18 of the Federal Power Act.

(2) *Exemption conditions.* Any exemption from licensing issued for conduit facilities, as provided in section 30 of the Federal Power Act, or for small hydroelectric power projects having a proposed installed capacity of 5,000 kilowatts or less, as provided in section 405(d) of the Public Utility Regulatory Policies Act of 1978, as amended, shall include such terms and conditions as the fish and wildlife agencies may timely determine are appropriate to carry out the responsibilities specified in section 30(c) of the Federal Power Act.

(3) *Required findings.* If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

(g) *Application.* The provisions of paragraphs (b) through (d) and (f) of this section apply only to applications for license or exemption; paragraph (e) applies only to applications for license.

(h) Unless otherwise provided by statute, regulation or order, all filings in hydropower hearings, except those conducted by trial-type procedures, shall conform to the requirements of subpart T of part 385 of this chapter.

(i) *Alternative procedures.* (1) An applicant may submit to the Commission a request to approve the use of alternative procedures for pre-filing consultation and the filing and processing of an application for an original, new or subsequent hydropower license or exemption that is subject to §4.38 or §16.8 of this chapter, or for the amendment of a license that is subject to the provisions of §4.38.

(2) The goal of such alternative procedures shall be to:

(i) Combine into a single process the pre-filing consultation process, the environmental review process under the National Environmental Policy Act and administrative processes associated with the Clean Water Act and other statutes;

(ii) Facilitate greater participation by and improve communication among the potential applicant, resource agencies, Indian tribes, the public and Commission staff in a flexible pre-filing consultation process tailored to the circumstances of each case;

(iii) Allow for the preparation of a preliminary draft environmental assessment by an applicant or its contractor or consultant, or of a preliminary draft environmental impact statement by a contractor or consultant chosen by the Commission and funded by the applicant;

(iv) Promote cooperative efforts by the potential applicant and interested entities and encourage them to share information about resource impacts

and mitigation and enhancement proposals and to narrow any areas of disagreement and reach agreement or settlement of the issues raised by the hydropower proposal; and

(v) Facilitate an orderly and expeditious review of an agreement or offer of settlement of an application for a hydropower license, exemption or amendment to a license.

(3) A potential hydropower applicant requesting the use of alternative procedures must:

(i) Demonstrate that a reasonable effort has been made to contact all resource agencies, Indian tribes, citizens' groups, and others affected by the applicant's proposal, and that a consensus exists that the use of alternative procedures is appropriate under the circumstances;

(ii) Submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities; and

(iii) Serve a copy of the request on all affected resource agencies and Indian tribes and on all entities contacted by the applicant that have expressed an interest in the alternative pre-filing consultation process.

(4) As appropriate under the circumstances of the case, the alternative procedures should include provisions for:

(i) Distribution of an initial information package and conduct of an initial information meeting open to the public;

(ii) The cooperative scoping of environmental issues (including necessary scientific studies), the analysis of completed studies and any further scoping; and

(iii) The preparation of a preliminary draft environmental assessment or preliminary draft environmental impact statement and related application.

(5)(i) If the potential applicant's request to use the alternative procedures is filed prior to July 23, 2005, the Commission will give public notice in the FEDERAL REGISTER inviting comment on the applicant's request to use alternative procedures. The Commission will consider any such comments in determining whether to grant or deny the applicant's request to use alternative procedures. Such a decision will not be subject to interlocutory rehearing or appeal.

(ii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and prior to the deadline date for filing a notification of intent to seek a new or subsequent license required by §5.5 of this chapter, the Commission will give public notice and invite comments as provided for in paragraph (i)(5)(i) of this section. Commission approval of the potential applicant's request to use the alternative procedures prior to the deadline date for filing of the notification of intent does not waive the potential applicant's obligation to file the notification of intent required by §5.5 of this chapter and Pre-Application Document required by §5.6 of this chapter.

(iii) If the potential applicant's request to use the alternative procedures is filed on or after July 23, 2005 and is at the same time as the notification of intent to seek a new or subsequent license required by §5.5, the public notice and comment procedures of part 5 of this chapter shall apply.

(6) If the Commission accepts the use of alternative procedures, the following provisions will apply.

(i) To the extent feasible under the circumstances of the proceeding, the Commission will give notice in the FEDERAL REGISTER and the applicant will give notice, in a local newspaper of general circulation in the county or counties in which the project is located, of the initial information meeting and the scoping of environmental issues. The applicant will also send notice of these stages to a mailing list approved by the Commission.

(ii) Every six months, the applicant shall file with the Commission a report summarizing the progress made in the pre-filing consultation process and referencing the applicant's public file, where additional information on that process can be obtained. Summaries or minutes of meetings held in the process

may be used to satisfy this filing requirement. The applicant must also file with the Commission a copy of its initial information package, each scoping document, and the preliminary draft environmental review document. All filings with the Commission under this section must include the number of copies required by paragraph (h) of this section, and the applicant shall send a copy of these filings to each participant that requests a copy.

(iii) At a suitable location, the applicant will maintain a public file of all relevant documents, including scientific studies, correspondence, and minutes or summaries of meetings, compiled during the pre-filing consultation process. The Commission will maintain a public file of the applicant's initial information package, scoping documents, periodic reports on the pre-filing consultation process, and the preliminary draft environmental review document.

(iv) An applicant authorized to use alternative procedures may substitute a preliminary draft environmental review document and additional material specified by the Commission instead of Exhibit E to its application and need not supply additional documentation of the pre-filing consultation process. The applicant will file with the Commission the results of any studies conducted or other documentation as directed by the Commission, either on its own motion or in response to a motion by a party to the licensing or exemption proceeding.

(v) Pursuant to the procedures approved, the participants will set reasonable deadlines requiring all resource agencies, Indian tribes, citizens' groups, and interested persons to submit to the applicant requests for scientific studies during the pre-filing consultation process, and additional requests for studies may be made to the Commission after the filing of the application only for good cause shown.

(vi) During the pre-filing process the Commission may require the filing of preliminary fish and wildlife recommendations, prescriptions, mandatory conditions, and comments, to be submitted in final form after the filing of the application; no notice that the application is ready for environmental analysis need be given by the Commission after the filing of an application pursuant to these procedures.

(vii) Any potential applicant, resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process may file a request with the Commission to resolve a dispute concerning the alternative process (including a dispute over required studies), but only after reasonable efforts have been made to resolve the dispute with other participants in the process. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must document what efforts have been made to resolve the dispute.

(7) If the potential applicant or any resource agency, Indian tribe, citizens' group, or other entity participating in the alternative pre-filing consultation process can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists and that continued use of the alternative process will not be productive, the participant may petition the Commission for an order directing the use by the potential applicant of appropriate procedures to complete its application. No such request shall be accepted for filing unless the entity submitting it certifies that it has been served on all other participants. The request must recommend specific procedures that are appropriate under the circumstances.

(8) The Commission may participate in the pre-filing consultation process and assist in the integration of this process and the environmental review process in any case, including appropriate cases where the applicant, contractor, or consultant funded by the applicant is not preparing a preliminary draft environmental assessment or preliminary draft environmental impact statement, but where staff assistance is available and could expedite the proceeding.

(9) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to

any person, the applicant shall follow the procedures set out in § 4.32(k).

[Order 533, 56 FR 23148, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991; Order 540, 57 FR 21737, May 22, 1992; Order 596, 62 FR 59810, Nov. 5, 1997; Order 2002, 68 FR 51116, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003]

§ 4.35 Amendment of application; date of acceptance.

(a) *General rule.* Except as provided in paragraph (d) of this section, if an applicant amends its filed application as described in paragraph (b) of this section, the date of acceptance of the application under § 4.32(f) is the date on which the amendment to the applicant was filed.

(b) Paragraph (a) of this section applies if an applicant:

(1) Amends its filed license or preliminary permit application in order to change the status or identity of the applicant or to materially amend the proposed plans of development; or

(2) Amends its filed application for exemption from licensing in order to materially amend the proposed plans of development, or

(3) Amends its filed application in order to change its statement of intent of whether or not it will seek benefits under section 210 of PURPA, as originally filed under § 4.32(c)(1).

(c) An application amended under paragraph (a) is a new filing for:

(1) The purpose of determining its timeliness under § 4.36 of this part;

(2) Disposing of competing applications under § 4.37; and

(3) Reissuing public notice of the application under § 4.32(d)(2).

(d) If an application is amended under paragraph (a) of this section, the Commission will rescind any acceptance letter already issued for the application.

(e) *Exceptions.* This section does not apply to:

(1) Any corrections of deficiencies made pursuant to § 4.32(e)(1);

(2) Any amendments made pursuant to § 4.37(b)(4) by a State or a municipality to its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a state or a municipality;

(3) Any amendments made pursuant to § 4.37(c)(2) by a priority applicant to its proposed plans of development to make them as well adapted as the proposed plans of an applicant that is not a priority applicant;

(4) Any amendments made by a license or an exemption applicant to its proposed plans of development to satisfy requests of resource agencies or Indian tribes submitted after an applicant has consulted under § 4.38 or concerns of the Commission; and

(5)(i) Any license or exemption applicant with a project located at a new dam or diversion who is seeking PURPA benefits and who:

(A) Has filed an adverse environmental effects (AEE) petition pursuant to § 292.211 of this chapter; and

(B) Has proposed measures to mitigate the adverse environmental effects which the Commission, in its initial determination on the AEE petition, stated the project will have.

(ii) This exception does not protect any proposed mitigative measures that the Commission finds are a pretext to avoid the consequences of materially amending the application or are outside the scope of mitigating the adverse environmental effects.

(f) *Definitions.* (1) For the purposes of this section, a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change, including but not limited to:

(i) A change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project;

(ii) A material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would:

(A) Enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse; or

(B) Cause adverse environmental impacts not previously discussed in the original application; or

(iii) A change in the number of discrete units of development to be included within the project boundary.

(2) For purposes of this section, a material amendment to plans of development proposed in an application for a preliminary permit means a material change in the location of the powerhouse or the size and elevation of the reservoir if the change would enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse.

(3) For purposes of this section, a change in the status of an applicant means:

(i) The acquisition or loss of preference as a state or a municipality under section 7(a) of the Federal Power Act; or

(ii) The loss of priority as a permittee under section 5 of the Federal Power Act.

(4) For purposes of this section, a change in the identity of an applicant means a change that either singly, or together with previous amendments, causes a total substitution of all the original applicants in a permit or a license application.

[Order 413, 50 FR 11680, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988; Order 533, 56 FR 23149, May 20, 1991; Order 2002, 68 FR 51115, Aug. 25, 2003]

§4.36 Competing applications: deadlines for filing; notices of intent; comparisons of plans of development.

The public notice of an initial preliminary permit application or an initial development application shall prescribe the deadline for filing protests and motions to intervene in that proceeding (the *prescribed intervention deadline*).

(a) *Deadlines for filing applications in competition with an initial preliminary permit application.* (1) Any preliminary permit application or any development application not filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than the prescribed intervention deadline.

(2) Any preliminary permit application filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than 30 days after the prescribed intervention deadline.

(3) Any development application filed pursuant to a notice of intent must be submitted for filing in competition with an initial preliminary permit application not later than 120 days after the prescribed intervention deadline.

(b) *Deadlines for filing applications in competition with an initial development application.* (1) Any development application not filed pursuant to a notice of intent must be submitted for filing in competition with an initial development application not later than the prescribed intervention deadline.

(2) Any development application filed pursuant to a notice of intent must be submitted for filing in competition with an initial development application not later than 120 days after the prescribed intervention deadline.

(3) If the Commission has accepted an application for exemption of a project from licensing and the application has not yet been granted or denied, the applicant for exemption may submit a license application for the project if it is a qualified license applicant. The pending application for exemption from licensing will be considered withdrawn as of the date the Commission accepts the license application for filing. If a license application is accepted for filing under this provision, any qualified license applicant may submit a competing license application not later than the prescribed intervention deadline set for the license application.

(4) Any preliminary permit application must be submitted for filing in competition with an initial development application not later than the deadlines prescribed in paragraphs (a)(1) and (a)(2) for the submission of preliminary permit applications filed in competition with an initial preliminary permit application.

(c) *Notices of intent.* (1) Any notice of intent to file an application in competition with an initial preliminary permit or an initial development application must be submitted for filing not

later than the prescribed intervention deadline for the initial application.

(2) A notice of intent must include:

(i) The exact name, business address, and telephone number of the prospective applicant; and

(ii) An unequivocal statement of intent to submit a preliminary permit application or a development application (specify which type of application).

(d) *Requirements for competing applications.* (1) Any competing application must:

(i) Conform to all requirements for filing an initial application; and

(ii) Include proof of service of a copy of the competing application on the person(s) designated in the public notice of the initial application for service of pleadings, documents, or communications concerning the initial application.

(2) *Comparisons of plans of development.* (i) After the deadline for filing applications in competition against an initial development application has expired, the Commission will notify each license and exemption applicant of the identity of the other applicants.

(ii) Not later than 14 days after the Commission serves the notification described in paragraph (d)(2)(i) of this section, if a license or exemption applicant has not already done so, it must serve a copy of its application on each of the other license and exemption applicants.

(iii) Not later than 60 days after the Commission serves the notification described in paragraph (d)(2)(i) of this section, each license and exemption applicant must file with the Commission a detailed and complete statement of how its plans are as well or better adapted than are the plans of each of the other license and exemption applicants to develop, conserve, and utilize in the public interest the water resources of the region. These statements should be supported by any technical analyses that the applicant deems appropriate to support its proposed plans of development.

[Order 413, 50 FR 11680, Mar. 25, 1985; 50 FR 23947, June 7, 1985]

§ 4.37 Rules of preference among competing applications.

Except as provided in § 4.33(e), the Commission will select among competing applications on the following bases:

(a) If an accepted application for a preliminary permit and an accepted application for a license propose project works that would develop, conserve, and utilize, in whole or in part, the same water resources, and the applicant for a license has demonstrated its ability to carry out its plans, the Commission will favor the license applicant unless the permit applicant substantiates in its filed application that its plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region.

(b) If two or more applications for preliminary permits or two or more applications for licenses (not including applications for a new license under section 15 of the Federal Power Act) are filed by applicants for project works that would develop, conserve, and utilize, in whole or in part, the same water resources, and if none of the applicants is a preliminary permittee whose application for license was accepted for filing within the permit period, the Commission will select between or among the applicants on the following bases:

(1) If both or neither of two applicants are either a municipality or a state, the Commission will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans.

(2) If both of two applicants are either a municipality or a state, or neither of them is a municipality or a state, and the plans of the applicants are equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the applicant with the earliest application acceptance date.

(3) If one of two applicants is a municipality or a state, and the other is

not, and the plans of the municipality or a state are at least as well adapted to develop, conserve, and utilize in the public interest the water resources of the region, the Commission will favor the municipality or state.

(4) If one of two applicant is a municipality or a state, and the other is not, and the plans of the applicant who is not a municipality or a state are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, the Commission will inform the municipality or state of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the municipality or state to render its plans at least as well adapted as the other plans. If the plans of the municipality or state are rendered at least as well adapted within the time allowed, the Commission will favor the municipality or state. If the plans are not rendered at least as well adapted within the time allowed, the Commission will favor the other applicant.

(c) If two or more applications for licenses are filed for project works which would develop, conserve, and utilize, in whole or in part, the same water resources, and one of the applicants was a preliminary permittee whose application was accepted for filing within the permit period (*priority applicant*), the Commission will select between or among the applicants on the following bases:

(1) If the plans of the priority applicant are at least as well adapted as the plans of each other applicant to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the priority applicant.

(2) If the plans of an applicant who is not a priority applicant are better adapted than the plans of the priority applicant to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans, the Commission will inform the priority applicant of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the priority applicant to render its plans at least as well adapted as the other plans. If the plans of the priority applicant are rendered at least as well adapted within the time allowed, then the Commission will favor the priority applicant. If the plans of the priority applicant are not rendered as well adapted within the time allowed, the criteria specified in paragraph (b) will govern.

(3) The criteria specified in paragraph (b) will govern selection among applicants other than the priority applicant.

(d) With respect to a project for which an application for an exemption from licensing has been accepted for filing, the Commission will select among competing applications on the following bases:

(1) If an accepted application for a preliminary permit and an accepted application for exemption from licensing propose to develop mutually exclusive small hydroelectric power projects, the Commission will favor the applicant whose substantiated plans in the application received by the Commission are better adapted to develop, conserve, and utilize in the public interest the water resources of the region. If the substantiated plans are equally well adapted, the Commission will favor the application for exemption from licensing.

(2) If an application for a license and an application for exemption from licensing, or two or more applications for exemption from licensing are each accepted for filing and each proposes to develop a mutually exclusive project, the Commission will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region. If the plans are equally well adapted, the Commission will favor the applicant with the earliest application acceptance date.

(e) A municipal applicant must provide evidence that the municipality is competent under applicable state and local laws to engage in the business of developing, transmitting, utilizing, or distributing power, or such applicant will be considered a non-municipal applicant for the purpose of determining

the disposition of competing applications.

[Order 413, 50 FR 11682, Mar. 25, 1985, as amended by Order 2002, 68 FR 51117, Aug. 25, 2003]

§ 4.38 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files any application for an original license or an exemption from licensing that is described in paragraph (a)(4) of this section, a potential applicant must consult with the relevant Federal, State, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands or facilities utilized or occupied by the project, the appropriate State fish and wildlife agencies, the appropriate State water resource management agencies, the certifying agency under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §1341(c)(1), and any Indian tribe that may be affected by the proposed project.

(2) Each requirement in this section to contact or consult with resource agencies or Indian tribes shall be construed to require as well that the potential applicant contact or consult with members of the public.

(3) If a potential applicant for an original license commences first stage pre-filing consultation on or after July 23, 2005 it shall file a notification of intent to file a license application pursuant to §5.5 and a pre-application document pursuant to the provisions of §5.6.

(4) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(5) An applicant for an exemption from licensing or an applicant for a license seeking benefits under section 210 of the Public Utility Regulatory Policies Act, as amended, for a project that would be located at a new dam or diversion must, in addition to meeting the requirements of this section, comply with the consultation requirements in §4.301.

(6) The pre-filing consultation requirements of this section apply only to an application for:

(i) Original license;

(ii) Exemption;

(iii) Amendment to an application for original license or exemption that materially amends the proposed plans of development as defined in §4.35(f)(1);

(iv) Amendment to an existing license that would increase the capacity of the project as defined in §4.201(b); or

(v) Amendment to an existing license that would not increase the capacity of the project as defined in §4.201(b), but that would involve:

(A) The construction of a new dam or diversion in a location where there is no existing dam or diversion;

(B) Any repair, modification, or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or elevation of an existing impoundment; or

(C) The addition of new water power turbines other than to replace existing turbines.

(7) Before it files a non-capacity related amendment as defined in §4.201(c), an applicant must consult with the resource agencies and Indian tribes listed in paragraph (a)(1) of this section to the extent that the proposed amendment would affect the interests of the agencies or tribes. When consultation is necessary, the applicant must, at a minimum, provide the resource agencies and Indian tribes with copies of the draft application and allow them at least 60 days to comment on the proposed amendment. The amendment as filed with the Commission must summarize the consultation with the resource agencies and Indian tribes on the proposed amendment, propose reasonable protection, mitigation, or enhancement measures to respond to impacts identified as being caused by the proposed amendment, and respond to any objections, recommendations, or conditions submitted by the agencies or Indian tribes. Copies of all written correspondence between the applicant, the agencies,

and the tribes must be attached to the application.

(8) This section does not apply to any application for a new license, a nonpower license, a subsequent license, or surrender of a license subject to sections 14 and 15 of the Federal Power Act.

(9) If a potential applicant has any doubt as to whether a particular application or amendment would be subject to the pre-filing consultation requirements of this section or if a waiver of the pre-filing requirements would be appropriate, the applicant may file a written request for clarification or waiver with the Director, Office of Energy Projects.

(b) *First stage of consultation.* (1) A potential applicant for an original license that commences pre-filing consultation on or after July 23, 2005 must, at the time it files its notification of intent to seek a license pursuant to §5.5 of this chapter and a pre-application document pursuant to §5.6 of this chapter and, at the same time, provide a copy of the pre-application document to the entities specified in §5.6(a) of this chapter.

(2) A potential applicant for an original license that commences pre-filing consultation under this part prior to July 23, 2005 or for an exemption must promptly contact each of the appropriate resource agencies, affected Indian tribes, and members of the public likely to be interested in the proceeding; provide them with a description of the proposed project and supporting information; and confer with them on project design, the impact of the proposed project (including a description of any existing facilities, their operation, and any proposed changes), reasonable hydropower alternatives, and what studies the applicant should conduct. The potential applicant must provide to the resource agencies, Indian tribes and the Commission the following information:

(i) Detailed maps showing project boundaries, if any, proper land descriptions of the entire project area by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of all proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(ii) A general engineering design of the proposed project, with a description of any proposed diversion of a stream through a canal or penstock;

(iii) A summary of the proposed operational mode of the project;

(iv) Identification of the environment to be affected, the significant resources present, and the applicant's proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time;

(v) Streamflow and water regime information, including drainage area, natural flow periodicity, monthly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the point of diversion or impoundment, with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations;

(vi) (A) A statement (with a copy to the Commission) of whether or not the applicant will seek benefits under section 210 of PURPA by satisfying the requirements for qualifying hydroelectric small power production facilities in §292.203 of this chapter;

(B) If benefits under section 210 of PURPA are sought, a statement on whether or not the applicant believes diversion (as that term is defined in §292.202(p) of this chapter) and a request for the agencies' view on that belief, if any;

(vii) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and

(viii) Any statement required by §4.301(a) of this part.

(3) (i) A potential exemption applicant and a potential applicant for an original license that commences pre-filing consultation;

(A) On or after July 23, 2005 pursuant to part 5 of this chapter and receives approval from the Commission to use the license application procedures of part 4 of this chapter; or

(B) Elects to commence pre-filing consultation under part 4 of this chapter prior to July 23, 2005; must:

(*1*) Hold a joint meeting at a convenient place and time, including an opportunity for a site visit, with all pertinent agencies, Indian tribes, and members of the public to explain the applicant's proposal and its potential environmental impact, to review the information provided, and to discuss the data to be obtained and studies to be conducted by the potential applicant as part of the consultation process;

(*2*) Consult with the resource agencies, Indian tribes and members of the public on the scheduling and agenda of the joint meeting; and

(*3*) No later than 15 days in advance of the joint meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.

(ii) The joint meeting must be held no earlier than 30 days, but no later than 60 days, from, as applicable;

(A) The date of the Commission's approval of the potential applicant's request to use the license application procedures of this part pursuant to the provisions of part 5 of this chapter; or

(B) The date of the potential applicant's letter transmitting the information required by paragraph (b)(2) of this section, in the case of a potential exemption applicant or a potential license applicant that commences prefiling consultation under this part prior to July 23, 2005.

(4) Members of the public must be informed of and invited to attend the joint meeting held pursuant to paragraph (b)(3) of this section by means of the public notice provision published in accordance with paragraph (g) of this section. Members of the public attending the meeting are entitled to participate in the meeting and to express their views regarding resource issues that should be addressed in any application for license or exemption that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(3) of this section will be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must promptly provide copies of these recordings or transcripts to the Commission and, upon request, to any resource agency, Indian tribe, or member of the public.

(5) Not later than 60 days after the joint meeting held under paragraph (b)(3) of this Section (unless extended within this time period by a resource agency, Indian tribe, or members of the public for an additional 60 days by sending written notice to the applicant and the Director of the Office of Energy Projects within the first 60 day period, with an explanation of the basis for the extension), each interested resource agency and Indian tribe must provide a potential applicant with written comments:

(i) Identifying its determination of necessary studies to be performed or the information to be provided by the potential applicant;

(ii) Identifying the basis for its determination;

(iii) Discussing its understanding of the resource issues and its goals and objectives for these resources;

(iv) Explaining why each study methodology recommended by it is more appropriate than any other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(2)(vii) of this section;

(v) Documenting that the use of each study methodology recommended by it is a generally accepted practice; and

(vi) Explaining how the studies and information requested will be useful to the agency, Indian tribe, or member of the public in furthering its resource goals and objectives that are affected by the proposed project.

(6)(i) If a potential applicant and a resource agency or Indian tribe disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency or Indian tribe may refer the dispute in writing to the Director of the Office of Energy Projects (Director) for resolution.

(ii) At the same time as the request for dispute resolution is submitted to the Director, the entity referring the

dispute must serve a copy of its written request for resolution on the disagreeing party and any affected resource agency or Indian tribe, which may submit to the Director a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director and written responses thereto pursuant to paragraphs (b)(6)(i) or (b)(6)(ii) of this section must be filed with the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director pursuant to §4.38(b)(6).

(iv) The Director will resolve the disputes by letter provided to the potential applicant and all affected resource agencies and Indian tribes.

(v) If a potential applicant does not refer a dispute regarding a request for a potential applicant to obtain information or conduct studies (other than a dispute regarding the information specified in paragraph (b)(2) of this section), or a study to the Director under paragraph (b)(6) of this section, or if a potential applicant disagrees with the Director's resolution of a dispute regarding a request for information (other than a dispute regarding the information specified in paragraph (b)(2) of this section) or a study, and if the potential applicant does not provide the requested information or conduct the requested study, the potential applicant must fully explain the basis for its disagreement in its application.

(vi) Filing and acceptance of an application will not be delayed, and an application will not be considered deficient or patently deficient pursuant to §4.32(e)(1) or (e)(2) of this part, merely because the application does not include a particular study or particular information if the Director had previously found, under paragraph (b)(6)(iv) of this section, that each study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the study methodology requested is not a generally accepted practice.

(7) The first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(5) of this section or 60 days after the joint meeting held under paragraph (b)(3) of this section, whichever occurs first, unless a resource agency or Indian tribe timely notifies the applicant and the Director of Energy Projects of its need for more time to provide written comments under paragraph (b)(5) of this section, in which case the first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(5) of this section or 120 days after the joint meeting held under paragraph (b)(5) of this section, whichever occurs first.

(c) *Second stage of consultation.* (1) Unless determined to be unnecessary by the Director pursuant to paragraph (b)(6) of this section, a potential applicant must diligently conduct all reasonable studies and obtain all reasonable information requested by resource agencies and Indian tribes under paragraph (b) of this section that are necessary for the Commission to make an informed decision regarding the merits of the application. These studies must be completed and the information obtained:

(i) Prior to filing the application, if the results:

(A) Would influence the financial (*e.g.*, instream flow study) or technical feasibility of the project (*e.g.*, study of potential mass soil movement); or

(B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (*e.g.*, resource surveys), or suitable mitigation or enhancement measures, or to minimize impact on significant resources (*e.g.*, wild and scenic river, anadromous fish, endangered species, caribou migration routes);

(ii) After filing the application but before issuance of a license or exemption, if the applicant otherwise complied with the provisions of paragraph (b)(2) of this section and the study or information gathering would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the expiration of the applicant's preliminary

permit or the application filing deadline set by the Commission;

(iii) After a new license or exemption is issued, if the studies can be conducted or the information obtained only after construction or operation of proposed facilities, would determine the success of protection, mitigation, or enhancement measures (*e.g.*, post-construction monitoring studies), or would be used to refine project operation or modify project facilities.

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(7) of this section, a resource agency or Indian tribe requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis and reasoning for its request, under paragraphs (b)(5) (i)–(vi) of this section, the potential applicant must promptly initiate the study or gather the information, unless the study or information is unreasonable or unnecessary for an informed decision by the Commission on the merits of the application or use of the methodology requested by a resource agency or Indian tribe for conducting the study is not a generally accepted practice. The applicant may refer any such request to the Director of the Office of Energy Projects for dispute resolution under the procedures set forth in paragraph (b)(6) of this section and need not conduct prior to filing any study determined by the Director to be unreasonable or unnecessary or to employ a methodology that is not generally accepted.

(3)(i) The results of studies and information-gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this section will be treated as additional information; and

(ii) Filing and acceptance of an application will not be delayed and an application will not be considered deficient or patently deficient pursuant to §4.32 (e)(1) or (e)(2) merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency and Indian tribe with:

(i) A copy of its draft application that:

(A) Indicates the type of application the potential applicant expects to file with the Commission; and

(B) Responds to any comments and recommendations made by any resource agency and Indian tribe either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information-gathering either requested by that resource agency or Indian tribe in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertain to resources of interest to that resource agency or Indian tribe and which were identified by the potential applicant pursuant to paragraph (b)(2)(vii) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measures; and

(iii) A written request for review and comment.

(5) A resource agency or Indian tribe will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency or Indian tribe has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold a joint meeting with the disagreeing resource agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the written comments of the disagreeing agency or Indian tribe to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures;

(ii) Consult with the disagreeing agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility on the scheduling of the joint meeting; and

(iii) At least 15 days in advance of the meeting, provide the Commission with written notice of the time and place of the meeting and a written agenda of the issues to be discussed at the meeting.

(7) The potential applicant and any disagreeing resource agency or Indian tribe may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency or Indian tribe on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency or Indian tribe, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) A potential applicant may file an application with the Commission if:

(i) It has complied with paragraph (c)(4) of this section and no resource agency or Indian tribe has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section and a resource agency or Indian tribe has responded with substantive disagreements.

(10) The second stage of consultation ends:

(i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency or Indian tribe has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in cases where a resource agency or Indian tribe has responded with substantive disagreements.

(d) *Third stage of consultation.* (1) The third stage of consultation is initiated by the filing of an application for a license or exemption, accompanied by a transmittal letter certifying that at the same time copies of the application are being mailed to the resource agencies, Indian tribes, other government offices, and consulted members of the public specified in paragraph (d)(2) of this section.

(2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct the applicant must serve on every resource agency, Indian tribes, and member of the public consulted, and on other government offices copies of:

(i) Its application for a license or an exemption from licensing;

(ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

(e) *Waiver of compliance with consultation requirements.* (1) If a resource agency or Indian tribe waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency or tribe.

(2) If a resource agency or Indian tribe fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency or Indian tribe to comply.

(3) The failure of a resource agency or Indian tribe to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(4) Following October 23, 2003, a potential license applicant engaged in pre-filing consultation under part 4 may during first stage consultation request to incorporate into pre-filing consultation any element of the integrated license application process provided for in part 5 of this chapter. Any such request must be accompanied by a:

(i) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and

(ii) Demonstration that the potential license applicant has made every reasonable effort to contact all resource agencies, Indian tribes, non-governmental organizations, and others affected by the applicant's proposal, and that a consensus exists in favor of incorporating the specific element of the part 5 process into the pre-filing consultation under this part.

(f) *Application requirements documenting consultation and any disagreements with resource agencies.* An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) and paragraphs (g) and (h) of this section, and must include a summary of the consultation process and:

(1) Any resource agency's or Indian tribe's letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreement with a resource agency or Indian tribe on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement, and

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency or Indian tribe;

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency or Indian tribe, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;

(6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in §2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan;

(7) A description of how the applicant's proposal addresses the significant resource issues raised at the joint meeting held pursuant to paragraph (b)(3) of this section; and

(8) A list containing the name and address of every federal, state, and interstate resource agency and Indian tribe with which the applicant consulted pursuant to paragraph (a)(1) of this section.

(g) *Public participation.* (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(3) of this section, the potential applicant must publish notice, at least once, of the purpose, location, and timing of the joint meeting, in a daily or weekly newspaper published in each county in which the proposed project or any part thereof is situated. The notice shall include a summary of the major issues to be discussed at the joint meeting.

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(2) of this section from the date on which the notice required by paragraph (g)(1) of this section is first published until a final order is issued on any license application.

(ii) The provisions of §4.32(b) will govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(3) of this section at least two copies of the information specified in paragraph (b)(2) of this section.

(h) *Critical Energy Infrastructure Information.* If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §4.32(k).

[Order 533, 56 FR 23153, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991; Order 2002, 68 FR 51117, Aug. 25, 2003; Order 643, 68 FR 52094, Sept. 2, 2003; 68 FR 61742, Oct. 30, 2003]

§ 4.39 Specifications for maps and drawings.

All required maps and drawings must conform to the following specifications, except as otherwise prescribed in this chapter:

(a) Each original map or drawing must consist of a print on silver or gelatin 35mm microfilm mounted on Type D (3¼″ by 7⅜″) aperture cards. Full-sized prints of maps and drawings must be on sheets no smaller than 24 by 36 inches and no larger than 28 by 40 inches. A space five inches high by seven inches wide must be provided in the lower right hand corner of each sheet. The upper half of this space must bear the title, numerical and graphical scale, and other pertinent information concerning the map or drawing. The lower half of the space must be left clear. Exhibit G drawings must be stamped by a registered land surveyor. If the drawing size specified in this paragraph limits the scale of structural drawings (exhibit F drawings) described in paragraph (c) of this section, a smaller scale may be used for those drawings. Potential applicants or licensees may be required to file maps or drawings in electronic format as directed by the Commission.

(b) Each map must have a scale in full-sized prints no smaller than one inch equals 0.5 miles for transmission lines, roads, and similar linear features and no smaller than one inch equals 1,000 feet for other project features, including the project boundary. Where maps at this scale do not show sufficient detail, large scale maps may be required.

(1) True and magnetic meridians;

(2) State, county, and town lines; and

(3) Boundaries of public lands and reservations of the United States [see 16 U.S.C. 796 (1) and (2)], if any. If a public land survey is available, the maps must show all lines of that survey crossing the project area and all official subdivisions of sections for the public lands and reservations, including lots and irregular tracts, as designated on the official plats of survey that may be obtained from the Bureau of Land Management, Washington, DC, or examined in the local land survey office; to the extent that a public land survey is not available for public lands and reservations of the United States, the maps must show the protractions of townships and section lines, which, if possible, must be those recognized by the Federal agency administering those lands.

(c) Drawings depicting details of project structures must have a scale in full-sized prints no smaller than:

(1) One inch equals 50 feet for plans, elevations, and profiles; and

(2) One inch equals 10 feet for sections.

(d) Each map or drawing must be drawn and lettered to be legible when it is reduced to a print that is 11 inches on its shorter side. Following notification to the applicant that the application has been accepted for filing [see §4.31(c)], prints reduced to that size must be bound in each copy of the application which is required to be submitted to the Commission or provided to any person, agency, or other entity.

(e) The maps and drawings showing project location information and details of project structures must be filed in accordance with the Commission's instructions on submission of Critical Energy Infrastructure Information in §§388.112 and 388.113 of subchapter X of this chapter.

[Order 54, 44 FR 61334, Oct. 25, 1979. Redesignated by Order 413, 50 FR 11678, Mar. 25, 1985; Order 2002, 68 FR 51119, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003]

Subpart E—Application for License for Major Unconstructed Project and Major Modified Project

§4.40 Applicability.

(a) *Applicability.* The provisions of this subpart apply to any application for an initial license for a major unconstructed project that would have a total installed capacity of more than 5 megawatts, and any application for an initial or new license for a major modified project with a total installed capacity more than 5 megawatts. An applicant for license for any major unconstructed or major modified water power project that would have a total installed generating capacity of 5 megawatts or less must submit application under subpart G (§§4.60 and 4.61).

(b) *Guidance from Commission staff.* A prospective applicant for a license for a major unconstructed project or major modified project may seek advice from the Commission's Office of Energy Projects regarding the applicability of

this subpart to its project [*see* § 4.32(h)], including the determinations whether any proposed repair, modification or reconstruction of an existing dam would result in a significant change in the normal maximum surface elevation of an existing impoundment, or whether any proposed change in existing project works or operation would result in a significant environmental impact.

[Order 184, 46 FR 55936, Nov. 13, 1981, as amended by Order 413, 50 FR 11683, Mar. 25, 1985; Order 499, 53 FR 27002, July 18, 1988; Order 2002, 68 FR 51119, Aug. 25, 2003]

§ 4.41 Contents of application.

Any application under this subpart must contain the following information in the form prescribed:

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for License for Major Unconstructed Project or Major Modified Project

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for a [license or new license, as appropriate] for the [name of project] water power project, as described in the attached exhibits. [Specify any previous FERC project number designation.]

(2) The location of the proposed project is:

State or territory: _____
County: _____
Township or nearby town: _____
Stream or other body of water: _____

(3) The exact name, business address, and telephone number of the applicant are:

_____

_____

(4) The applicant is a (citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or State, as appropriate) and (is/is not) claiming preference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located and that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act, are: [provide citation and brief identification of the nature of each requirement; if the applicant is a municipality, the applicant must submit copies of applicable state or local laws or a municipal charter or, if such laws or documents are not clear, any other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power.]

(ii) The steps which the applicant has taken, or plans to take, to comply with each of the laws cited above are: [provide brief description for each requirement]

(b) *Exhibit A* is a description of the project. If the project includes more than one dam with associated facilities, each dam and the associated component parts must be described together as a discrete development. The description for each development must contain:

(1) The physical composition, dimensions, and general configuration of any dams, spillways, penstocks, powerhouses, tailraces or other structures proposed to be included as part of the project;

(2) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments to be included as part of the project;

(3) The number, type and rated capacity of any proposed turbines or generators to be included as part of the project;

(4) The number, length, voltage and interconnections of any primary transmission lines proposed to be included a part of the project [*See* 16 U.S.C. 796(11)];

(5) The description of any additional mechanical, electrical, and transmission equipment appurtenant to the project; and

(6) All lands of the United States, including lands patented subject to the provisions of section 24 of the Act, 16 U.S.C. 818, that are enclosed within the project boundary described under paragraph (h) of this section (Exhibit G), identified and tabulated by legal subdivisions of a public land survey, by the best available legal description. The tabulation must show the total acreage of the lands of the United States within the project boundary.

(c) *Exhibit B* is a statement of project operation and resource utilization. If the project includes more than one dam with associated facilities, the information must be provided separately for each discrete development. The exhibit must contain:

(1) A description of each alternative site considered in selecting of the proposed site;

(2) A description of any alternative facility designs, processes, and operations that were considered.

(3) A statement as to whether operation of the power plant will be manual or automatic, an estimate of the annual plant factor, and a statement of how the project will be operated during adverse, mean, and high water years;

(4) An estimate of the dependable capacity and average annual energy production in kilowatt-hours (or mechanical equivalent), supported by the following data:

(i) The minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, with a specification of any adjustment made for evaporation, leakage minimum flow releases (including duration of releases) or other reductions in available flow; monthly flow duration curves indicating the period of record and the gauging stations used in deriving the curves; and a specification of the critical streamflow used to determine the dependable capacity;

(ii) An area-capacity curve showing the gross storage capacity and usable storage capacity of the impoundment, with a rule curve showing the proposed operation of the impoundment and how the usable storage capacity is to be utilized;

(iii) The estimated minimum and maximum hydraulic capacity of the powerplant in terms of flow and efficiency (cubic feet per second at one-half, full and best gate), and the corresponding generator output in kilowatts;

(iv) A tailwater rating curve; and

(v) A curve showing powerplant capability versus head and specifying maximum, normal, and minimum heads;

(5) A statement of system and regional power needs and the manner in which the power generated at the project is to be utilized, including the amount of power to be used on-site, if any, supported by the following data:

(i) Load curves and tabular data, if appropriate;

(ii) Details of conservation and rate design programs and their historic and projected impacts on system loads; and

(iii) The amount of power to be sold and the identity of proposed purchaser(s); and

(6) A statement of the applicant's plans for future development of the project or of any other existing or proposed water power project on the affected stream or other body of water, indicating the approximate location and estimated installed capacity of the proposed developments.

(d) *Exhibit C* is a proposed construction schedule for the project. The information required may be supplemented with a bar chart. The construction schedule must contain:

(1) The proposed commencement and completion dates of any new construction, modification, or repair of major project works;

(2) The proposed commencement date of first commercial operation of each new major facility and generating unit; and

(3) If any portion of the proposed project consists of previously constructed, unlicensed water power structures or facilities, a chronology of original completion dates of those structures or facilities specifying dates (approximate dates must be identified as such) of:

(i) Commencement and completion of construction or installation;

(ii) Commencement of first commercial operation; and

(iii) Any additions or modifications other than routine maintenance.

(e) *Exhibit D* is a statement of project costs and financing. The exhibit must contain:

(1) A statement of estimated costs of any new construction, modification, or repair, including:

(i) The cost of any land or water rights necessary to the development;

(ii) The total cost of all major project works;

(iii) Indirect construction costs such as costs of construction equipment, camps, and commissaries;

(iv) Interest during construction; and

(v) Overhead, construction, legal expenses, and contingencies;

(2) If any portion of the proposed project consists of previously constructed, unlicensed water power structures or facilities, a statement of the original cost of those structures or facilities specifying for each, to the extent possible, the actual or approximate total costs (approximate costs must be identified as such) of:

(i) Any land or water rights necessary to the existing project works;

(ii) All major project works; and

(iii) Any additions or modifications other than routine maintenance;

(3) If the applicant is a licensee applying for a new license, and is not a municipality or a state, an estimate of the amount which would be payable if the project were to be taken over pursuant to section 14 of the Federal Power Act, 16 U.S.C. 807, upon expiration of the license in effect including:

(i) Fair value;

(ii) Net investment; and

(iii) Severance damages;

(4) A statement of the estimated average annual cost of the total project as proposed, specifying any projected changes in the costs (life-cycle costs) over the estimated financing or licensing period if the applicant takes such changes into account, including:

(i) Cost of capital (equity and debt);

(ii) Local, state, and Federal taxes;

(iii) Depreciation or amortization,

(iv) Operation and maintenance expenses, including interim replacements, insurance, administrative and general expenses, and contingencies; and

(v) The estimated capital cost and estimated annual operation and maintenance expense of each proposed environmental measure;

(5) A statement of the estimated annual value of project power based on a showing of the contract price for sale of power or the estimated average annual cost of obtaining an equivalent amount of power (capacity and energy) from the lowest cost alternative source of power, specifying any projected changes in the costs (life-cycle costs) of power from that source over the estimated financing or licensing period if the applicant takes such changes into account;

(6) A statement describing other electric energy alternatives, such as gas, oil, coal and nuclear-fueled powerplants and other conventional and pumped storage hydroelectric plants;

(7) A statement and evaluation of the consequences of denial of the license application and a brief perspective of what future use would be made of the proposed site if the proposed project were not constructed;

(8) A statement specifying the sources and extent of financing and annual revenues available to the applicant to meet the costs identified in paragraphs (e) (1) and (4) of this section;

(9) An estimate of the cost to develop the license application; and

(10) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river.

(f) *Exhibit E* is an Environmental Report. Information provided in the report must be organized and referenced according to the itemized subparagraphs below. *See* § 4.38 for consultation requirements. The Environmental Report must contain the following information, *commensurate with the scope of the project:*

(1) *General description of the locale.* The applicant must provide a general description of the environment of the proposed project area and its immediate vicinity. The description must include location and general information helpful to an understanding of the environmental setting.

(2) *Report on water use and quality.* The report must discuss water quality and flows and contain baseline data sufficient to determine the normal and seasonal variability, the impacts expected during construction and operation, and any mitigative, enhancement, and protective measures proposed by the applicant. The report must be prepared in consultation with the state and Federal agencies with responsibility for management of water quality and quantity in the affected

stream or other body of water. The report must include:

(i) A description of existing instream flow uses of streams in the project area that would be affected by construction and operation; estimated quantities of water discharged from the proposed project for power production; and any existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes;

(ii) A description of the seasonal variation of existing water quality for any stream, lake, or reservoir that would be affected by the proposed project, including (as appropriate) measurements of: significant ions, chlorophyll *a*, nutrients, specific conductance, pH, total dissolved solids, total alkalinity, total hardness, dissolved oxygen, bacteria, temperature, suspended sediments, turbidity and vertical illumination;

(iii) A description of any existing lake or reservoir and any of the proposed project reservoirs including surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate classification, and gradient for streams directly affected by the proposed project;

(iv) A quantification of the anticipated impacts of the proposed construction and operation of project facilities on water quality and downstream flows, such as temperature, turbidity and nutrients;

(v) A description of measures recommended by Federal and state agencies and the applicant for the purpose of protecting or improving water quality and stream flows during project construction and operation; an explanation of why the applicant has rejected any measures recommended by an agency; and a description of the applicant's alternative measures to protect or improve water quality stream flow;

(vi) A description of groundwater in the vicinity of the proposed project, including water table and artesian conditions, the hydraulic gradient, the degree to which groundwater and surface water are hydraulically connected, aquifers and their use as water supply, and the location of springs, wells, artesian flows and disappearing streams; a description of anticipated impacts on groundwater and measures proposed by the applicant and others for the mitigation of impacts on groundwater; and

(3) *Report on fish, wildlife, and botanical resources.* The applicant must provide a report that describes the fish, wildlife, and botanical resources in the vicinity of the proposed project; expected impacts of the project on these resources; and mitigation, enhancement, or protection measures proposed by the applicant. The report must be prepared in consultation with the state agency or agencies with responsibility for these resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (if the proposed project may affect anadromous, estuarine, or marine fish resources), and any state or Federal agency with managerial authority over any part of the proposed project lands. The report must contain:

(i) A description of existing fish, wildlife, and plant communities of the proposed project area and its vicinity, including any downstream areas that may be affected by the proposed project and the area within the transmission line corridor or right-of-way. A map of vegetation types should be included in the description. For species considered important because of their commercial or recreational value, the information provided should include temporal and spatial distributions and densities of such species. Any fish, wildlife, or plant species proposed or listed as threatened or endangered by the U.S. Fish and Wildlife Service or National Marine Fisheries Service [*see* 50 CFR 17.11 and 17.12] must be identified;

(ii) A description of the anticipated impacts on fish, wildlife and botanical resources of the proposed construction and operation of project facilities, including possible changes in size, distribution, and reproduction of essential population of these resources and any impacts on human utilization of these resources;

(iii) A description of any measures or facilities recommended by state or Federal agencies for the mitigation of impacts on fish, wildlife, and botanical

resources, or for the protection or enhancement of these resources, the impact on threatened or endangered species, and an explanation of why the applicant has determined any measures or facilities recommended by an agency are inappropriate as well as a description of alternative measures proposed by applicant to protect fish, wildlife and botanical resources; and

(iv) The following materials and information regarding any mitigation measures or facilities, identified under clause (iii), proposed for implementation or construction:

(A) Functional design drawings;

(B) A description of proposed operation and maintenance procedures for any proposed measures or facilities;

(C) An implementation, construction and operation schedule for any proposed measures or facilities;

(D) An estimate of the costs of construction, operation, and maintenance of any proposed facilities or implementation of any measures;

(E) A statement of the sources and amount of financing for mitigation measures or facilities; and

(F) A map or drawing showing, by the use of shading, crosshatching or other symbols, the identity and location of any proposed measures or facilities.

(4) *Report on historic and archaeological resources.* The applicant must provide a report that discusses any historical and archaeological resources in the proposed project area, the impact of the proposed project on those resources and the avoidance, mitigation, and protection measures proposed by the applicant. The report must be prepared in consultation with the State Historic Preservation Officer (SHPO) and the National Park Service of the U.S. Department of Interior. The report must contain:

(i) A description of any discovery measures, such as surveys, inventories, and limited subsurface testing work, recommended by the specified state and Federal agencies for the purpose of locating, identifying, and assessing the significance of historic and archaeological resources that would be affected by construction and operation of the proposed project, together with a statement of the applicant's position regarding the acceptability of the recommendations;

(ii) The results of surveys, inventories, and subsurface testing work recommended by the state and Federal agencies listed above, together with an explanation by the applicant of any variations from the survey, inventory, or testing procedures recommended;

(iii) An identification (without providing specific site or property locations) of any historic or archaeological site in the proposed project area, with particular emphasis on sites or properties either listed in, or recommended by the SHPO for inclusion in, the National Register of Historic Places that would be affected by the construction of the proposed project;

(iv) A description of the likely direct and indirect impacts of proposed project construction or operation on sites or properties either listed in, or recommended as eligible for, the National Register of Historic Places;

(v) A management plan for the avoidance of, or mitigation of, impacts on historic or archaeological sites and resources based upon the recommendations of the state and Federal agencies listed above and containing the applicant's explanation of variations from those recommendations; and

(vi) The following materials and information regarding the mitigation measures described under paragraph (f)(4)(v) of this section:

(A) A schedule for implementing the mitigation proposals;

(B) An estimate of the cost of the measures; and

(C) A statement of the sources and extent of financing.

(vii) The applicant must provide five copies (rather than the fourteen copies required under §4.32(b)(1) of the Commission's regulations) of any survey, inventory, or subsurface testing reports containing specific site and property information, and including maps and photographs showing the location and any required alteration of historic and archaeological resources in relation to proposed project facilities.

(5) *Report on socio-economic impacts.* The applicant must provide a report which identifies and quantifies the impacts of constructing and operating the

proposed project on employment, population, housing, personal income, local governmental services, local tax revenues and other factors within the towns and counties in the vicinity of the proposed project. The report must include:

(i) A description of the socio-economic impact area;

(ii) A description of employment, population and personal income trends in the impact area;

(iii) An evaluation of the impact of any substantial in-migration of people on the impact area's governmental facilities and services, such as police, fire, health and educational facilities and programs;

(iv) On-site manpower requirements and payroll during and after project construction, including a projection of total on-site employment and construction payroll provided by month;

(v) Numbers of project construction personnel who:

(A) Currently reside within the impact area;

(B) Would commute daily to the construction site from places situated outside the impact area; and

(C) Would relocate on a temporary basis within the impact area;

(vi) A determination of whether the existing supply of available housing within the impact area is sufficient to meet the needs of the additional population;

(vii) Numbers and types of residences and business establishments that would be displaced by the proposed project, procedures to be utilized to acquire these properties, and types and amounts of relocation assistance payments that would be paid to the affected property owners and businesses; and

(viii) A fiscal impact analysis evaluating the incremental local government expenditures in relation to the incremental local government revenues that would result from the construction of the proposed project. Incremental expenditures may include, but are not be limited to, school operating costs, road maintenance and repair, public safety, and public utility costs.

(6) *Report on geological and soil resources.* The applicant must provide a report on the geological and soil resources in the proposed project area and other lands that would be directly or indirectly affected by the proposed action and the impacts of the proposed project on those resources. The information required may be supplemented with maps showing the location and description of conditions. The report must contain:

(i) A detailed description of geological features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources;

(ii) A detailed description of the soils, including the types, occurrence, physical and chemical characteristics, erodability and potential for mass soil movement;

(iii) A description showing the location of existing and potential geological and soil hazards and problems, including earthquakes, faults, seepage, subsidence, solution cavities, active and abandoned mines, erosion, and mass soil movement, and an identification of any large landslides or potentially unstable soil masses which could be aggravated by reservoir fluctuation;

(iv) A description of the anticipated erosion, mass soil movement and other impacts on the geological and soil resources due to construction and operation of the proposed project; and

(v) A description of any proposed measures of facilities for the mitigation of impacts on soils.

(7) *Report on recreational resources.* The applicant must prepare a report containing a proposed recreation plan describing utilization, design and development of project recreational facilities, and public access to the project area. Development of the plan should include consideration of the needs of the physically handicapped. Public and private recreational facilities provided by others that would abut the project should be noted in the report. The report must be prepared in consultation with appropriate local, regional, state and Federal recreation agencies and planning commissions, the National Park Service of the U.S. Department of the Interior, and any other state or Federal agency with managerial responsibility for any part of the project lands. The report must contain:

(i) A description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in:

(A) The National Wild and Scenic Rivers Systems (*see* 16 U.S.C. 1271);

(B) The National Trails System (*see* 16 U.S.C. 1241); or

(C) A wilderness area designated under the Wilderness Act (*see* 16 U.S.C. 1132);

(ii) A detailed description of existing recreational facilities within the project vicinity, and the public recreational facilities which are to be provided by the applicant at its sole cost or in cooperation with others no later than 3 years from the date of first commercial operation of the proposed project and those recreation facilities planned for future development based on anticipated demand. When public recreation facilities are to be provided by other entities, the applicant and those entities should enter into an agreement on the type of facilities to be provided and the method of operation. Copies of agreements with cooperating entities are to be appended to the plan;

(iii) A provision for a shoreline buffer zone that must be within the project boundary, above the normal maximum surface elevation of the project reservoir, and of sufficient width to allow public access to project lands and waters and to protect the scenic, public recreational, cultural, and other environmental values of the reservoir shoreline;

(iv) Estimates of existing and future recreational use at the project, in daytime and overnight visitation (recreation days), with a description of the methodology used in developing these data;

(v) A development schedule and cost estimates of the construction, operation, and maintenance of existing, initial, and future public recreational facilities, including a statement of the source and extent of financing for such facilities;

(vi) A description of any measures or facilities recommended by the agencies consulted for the purpose of creating, preserving, or enhancing recreational opportunities at the proposed project, and for the purpose of ensuring the safety of the public in its use of project lands and waters, including an explanation of why the applicant has rejected any measures or facilities recommended by an agency; and

(vii) A drawing or drawings, one of which describes the entire project area, clearly showing:

(A) The location of project lands, and the types and number of existing recreational facilities and those proposed for initial development, including access roads and trails, and facilities for camping, picnicking, swimming, boat docking and launching, fishing and hunting, as well as provisions for sanitation and waste disposal;

(B) The location of project lands, and the type and number of recreational facilities planned for future development;

(C) The location of all project lands reserved for recreational uses other than those included in paragraphs (f)(7)(vii) (A) and (B) of this section; and

(D) The project boundary (excluding surveying details) of all areas designated for recreational development, sufficiently referenced to the appropriate Exhibit G drawings to show that all lands reserved for existing and future public recreational development and the shoreline buffer zone are included within the project boundary. Recreational cottages, mobile homes and year-round residences for private use are not to be considered as public recreational facilities, and the lands on which these private facilities are to be developed are not to be included within the proposed project boundary.

(8) *Report on aesthetic resources.* The applicant must provide a report that describes the aesthetic resources of the proposed project area, the expected impacts of the project on these resources, and the mitigation, enhancement or protection measures proposed. The report must be prepared following consultation with Federal, state, and local agencies having managerial responsibility for any part of the proposed project lands or lands abutting those lands. The report must contain:

(i) A description of the aesthetic character of lands and waters directly

and indirectly affected by the proposed project facilities;

(ii) A description of the anticipated impacts on aesthetic resources from construction activity and related equipment and material, and the subsequent presence of proposed project facilities in the landscape;

(iii) A description of mitigative measures proposed by the applicant, including architectural design, landscaping, and other reasonable treatment to be given project works to preserve and enhance aesthetic and related resources during construction and operation of proposed project facilities; and

(iv) Maps, drawings and photographs sufficient to provide an understanding of the information required under this paragraph. Maps or drawings may be consolidated with other maps or drawings required in this exhibit and must conform to the specifications of §4.39.

(9) *Report on land use.* The applicant must provide a report that describes the existing uses of the proposed project lands and adjacent property, and those land uses which would occur if the project is constructed. The report may reference the discussions of land uses in other sections of this exhibit. The report must be prepared following consultation with local and state zoning or land management authorities, and any Federal or state agency with managerial responsibility for the proposed project or abutting lands. The report must include:

(i) A description of existing land use in the proposed project area, including identification of wetlands, floodlands, prime or unique farmland as designated by the Natural Resources Conservation Service of the U.S. Department of Agriculture, the Special Area Management Plan of the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, and lands owned or subject to control by government agencies;

(ii) A description of the proposed land uses within and abutting the project boundary that would occur as a result of development and operation of the project; and

(iii) Aerial photographs, maps, drawings or other graphics sufficient to show the location, extent and nature of the land uses referred to in this section.

(10) *Alternative locations, designs, and energy sources.* The applicant must provide an environment assessment of the following:

(i) Alternative sites considered in arriving at the selection of the proposed project site;

(ii) Alternative facility designs, processes, and operations that were considered and the reasons for their rejection;

(iii) Alternative electrical energy sources, such as gas, oil, coal, and nuclear-fueled power plants, purchased power or diversity exchange, and other conventional and pumped-storage hydroelectric plants; and

(iv) The overall consequences if the license application is denied.

(11) *List of literature.* Exhibit E must include a list of all publications, reports, and other literature which were cited or otherwise utilized in the preparation of any part of the environmental report.

(g) *Exhibit F* consists of general design drawings of the principal project works described under paragraph (b) of this section (Exhibit A) and supporting information used as the basis of design. If the Exhibit F submitted with the application is preliminary in nature, applicant must so state in the application. The drawings must conform to the specifications of §4.39.

(1) The drawings must show all major project structures in sufficient detail to provide a full understanding of the project, including:

(i) Plans (overhead view);

(ii) Elevations (front view);

(iii) Profiles (side view); and

(iv) Sections.

(2) The applicant may submit preliminary design drawings with the application. The final Exhibit F may be submitted during or after the licensing process and must show the precise plans and specifications for proposed structures. If the project is licensed on the basis of preliminary designs, the applicant must submit a final Exhibit F for Commission approval prior to commencement of any construction of the project.

(3) *Supporting design report.* The applicant must furnish, at a minimum, the

following supporting information to demonstrate that existing and proposed structures are safe and adequate to fulfill their stated functions and must submit such information in a separate report at the time the application is filed. The report must include:

(i) An assessment of the suitability of the site and the reservoir rim stability based on geological and subsurface investigations, including investigations of soils and rock borings and tests for the evaluation of all foundations and construction materials sufficient to determine the location and type of dam structure suitable for the site;

(ii) Copies of boring logs, geology reports and laboratory test reports;

(iii) An identification of all borrow areas and quarry sites and an estimate of required quantities of suitable construction material;

(iv) Stability and stress analyses for all major structures and critical abutment slopes under all probable loading conditions, including seismic and hydrostatic forces induced by water loads up to the Probable Maximum Flood as appropriate; and

(v) The bases for determination of seismic loading and the Spillway Design Flood in sufficient detail to permit independent staff evaluation.

(4) The applicant must submit two copies of the supporting design report described in paragraph (g)(3) of this section at the time preliminary and final design drawings are submitted to the Commission for review. If the report contains preliminary drawings, it must be designated a ''Preliminary Supporting Design Report.''

(h) *Exhibit G* is a map of the project that must conform to the specifications of §4.39. In addition, to the other components of Exhibit G, the Applicant must provide the project boundary data in a geo-referenced electronic format—such as ArcView shape files, GeoMedia files, MapInfo files, or any similar format. The electronic boundary data must be positionally accurate to ±40 feet, in order to comply with the National Map Accuracy Standards for maps at a 1:24,000 scale (the scale of USGS quadrangle maps). The electronic exhibit G data must include a text file describing the map projection used (*i.e.*, UTM, State Plane, Decimal Degrees, etc.), the map datum (*i.e.*, feet, meters, miles, etc.). Three sets of the maps must be submitted on compact disk or other appropriate electronic media. If more than one sheet is used for the paper maps, the sheets must be numbered consecutively, and each sheet must bear a small insert sketch showing the entire project and indicate that portion of the project depicted on that sheet. Each sheet must contain a minimum of three known reference points. The latitude and longitude coordinates, or state plane coordinates, of each reference point must be shown. If at any time after the application is filed there is any change in the project boundary, the applicant must submit, within 90 days following the completion of project construction, a final exhibit G showing the extent of such changes. The map must show:

(1) *Location of the project and principal features.* The map must show the location of the project as a whole with reference to the affected stream or other body of water and, if possible, to a nearby town or any other permanent monuments or objects, such as roads, transmission lines or other structures, that can be noted on the map and recognized in the field. The map must also show the relative locations and physical interrelationships of the principal project works and other features described under paragraph (b) of this section (Exhibit A).

(2) *Project boundary.* The map must show a project boundary enclosing all project works and other features described under paragraph (b) of this section (Exhibit A) that are to be licensed. If accurate survey information is not available at the time the application is filed, the applicant must so state, and a tentative boundary may be submitted. The boundary must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, shoreline control, or protection of environmental resources (*see* paragraph (f) of this section (Exhibit E)). Existing residential, commercial, or other structures may be included within the boundary only to the extent that underlying lands are needed for project purposes (e.g., for flowage, public recreation, shoreline control, or

protection of environmental resources). If the boundary is on land covered by a public survey, ties must be shown on the map at sufficient points to permit accurate platting of the position of the boundary relative to the lines of the public land survey. If the lands are not covered by a public land survey, the best available legal description of the position of the boundary must be provided, including distances and directions from fixed monuments or physical features. The boundary must be described as follows:

(i) *Impoundments.* (A) The boundary around a project impoundment must be described by one of the following:

(*1*) Contour lines, including the contour elevation (preferred method);

(*2*) Specified courses and distances (metes and bounds);

(*3*) If the project lands are covered by a public land survey, lines upon or parallel to the lines of the survey; or

(*4*) Any combination of the above methods.

(B) The boundary must be located no more than 200 feet (horizontal measurement) from the exterior margin of the reservoir, defined by the normal maximum surface elevation, except where deviations may be necessary in describing the boundary according to the above methods or where additional lands are necessary for project purposes, such as public recreation, shoreline control, or protection of environmental resources.

(ii) *Continuous features.* The boundary around linear (*continuous*) project features such as access roads, transmission lines, and conduits may be described by specified distances from center lines or offset lines of survey. The width of such corridors must not exceed 200 feet unless good cause is shown for a greater width. Several sections of a continuous feature may be shown on a single sheet with information showing the sequence of contiguous sections.

(iii) *Noncontinuous features.* (A) The boundary around noncontinuous project works such as dams, spillways, and powerhouses must be described by one of the following:

(*1*) Contour lines;

(*2*) Specified courses and distances;

(*3*) If the project lands are covered by a public land survey, lines upon or parallel to the lines of the survey; or

(*4*) Any combination of the above methods.

(B) The boundary must enclose only those lands that are necessary for safe and efficient operation and maintenance of the project or for other specified project purposes, such as public recreation or protection of environmental resources.

(3) *Federal lands.* Any public lands and reservations of the United States (*Federal lands*) [*see* 16 U.S.C. 796 (1) and (2)] that are within the project boundary, such as lands administered by the U.S. Forest Service, Bureau of Land Management, or National Park Service, or Indian tribal lands, and the boundaries of those Federal lands, must be identified as such on the map by:

(i) Legal subdivisions of a public land survey of the affected area (a protraction of identified township and section lines is sufficient for this purpose); and

(ii) The Federal agency, identified by symbol or legend, that maintains or manages each identified subdivision of the public land survey within the project boundary; or

(iii) In the absence of a public land survey, the location of the Federal lands according to the distances and directions from fixed monuments or physical features. When a Federal survey monument or a Federal bench mark will be destroyed or rendered unusable by the construction of project works, at least two permanent, marked witness monuments or bench marks must be established at accessible points. The maps show the location (and elevation, for bench marks) of the survey monument or bench mark which will be destroyed or rendered unusable, as well as of the witness monuments or bench marks. Connecting courses and distances from the witness monuments or bench marks to the original must also be shown.

(iv) The project location must include the most current information pertaining to affected Federal lands as described under §4.81(b)(5).

(4) *Non-Federal lands.* For those lands within the project boundary not identified under paragraph (h)(3) of this section, the map must identify by legal subdivision:

(i) Lands owned in fee by the applicant and lands that the applicant plans to acquire in fee; and

(ii) Lands over which the applicant has acquired or plans to acquire rights to occupancy and use other than fee title, including rights acquired or to be acquired by easement or lease.

[Order 184, 46 FR 55936, Nov. 13, 1981; 48 FR 4459, Feb. 1, 1983, as amended by Order 413, 50 FR 11684, Mar. 25, 1985; Order 464, 52 FR 5449, Feb. 23, 1987; Order 540, 57 FR 21737, May 22, 1992; Order 2002, 68 FR 51119, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003; 68 FR 63194, Nov. 7, 2003; 68 FR 69957, Dec. 16, 2003]

Subpart F—Application for License for Major Project—Existing Dam

AUTHORITY: Federal Power Act, as amended (16 U.S.C. 792–828c); Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601–2645); Department of Energy Organization Act (42 U.S.C. 7101–7352); E.O. 12009, 42 FR 46267; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.).*

§ 4.50 Applicability.

(a) *Applicability.* (1) Except as provided in paragraph (a)(2) of this section, the provisions of this subpart apply to any application for either an initial license or new license for a major project—existing dam that is proposed to have a total installed capacity of more than 5 megawatts.

(2) This subpart does not apply to any major project—existing dam (*see* § 4.40) that is proposed to entail or include:

(i) Any repair, modification or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or normal maximum surface elevation of an existing impoundment; or

(ii) Any new development or change in project operation that would result in a significant environmental impact.

(3) An applicant for license for any major project—existing dam that would have a total installed capacity of 5 megawatts or less must submit application under subpart G (§§ 4.60 and 4.61).

(b) *Guidance from Commission staff.* A prospective applicant for a major license—existing dam may seek advice from the Commission staff regarding the applicability of these sections to its project (*see* § 4.32(h)), including the determinations whether any proposed repair or reconstruction of an existing dam would result in a significant change in the normal maximum surface area or the normal maximum surface elevation of an existing impoundment, or whether any proposed new development or change in project operation would result in a significant environmental impact.

[Order 59, 44 FR 67651, Nov. 27, 1979, as amended by Order 184, 46 FR 55942, Nov. 13, 1981; Order 413, 50 FR 11684, Mar. 25, 1985; Order 499, 53 FR 27002, July 18, 1988]

§ 4.51 Contents of application.

An application for license under this subpart must contain the following information in the form specified. As provided in paragraph (f) of this section, the appropriate Federal, state, and local resource agencies must be given the opportunity to comment on the proposed project, prior to filing of the application for license for major project—existing dam. Information from the consultation process must be included in this Exhibit E, as appropriate.

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for License for Major Project—Existing Dam

(1) (Name of applicant) applies to the Federal Energy Regulatory Commission for a (license or new license, as appropriate) for the (name of project) water power project, as described in the attached exhibits. (Specify any previous FERC project number designation.)

(2) The location of the project is:

State or territory: _____
County: _____
Township or nearby town: _____
Stream or other body of water: _____

(3) The exact name and business address of the applicant are:

_____
_____
_____
_____

The exact name and business address of each person authorized to act as agent for the applicant in this application are:

(4) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or state, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed, with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act, are: [Provide citation and brief identification of the nature of each requirement; if the applicant is a municipality, the applicant must submit copies of applicable state and local laws or a municipal charter, or, if such laws or documents are not clear, other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power.]

(ii) The steps which the applicant has taken or plans to take to comply with each of the laws cited above are: (provide brief description for each law).

(6) The applicant must provide the name and address of the owner of any existing project facilities. If the dam is federally owned or operated, provide the name of the agency.

(b) *Exhibit A* is a description of the project. This exhibit need not include information on project works maintained and operated by the U.S. Army Corps of Engineers, the Bureau of Reclamation, or any other department or agency of the United States, except for any project works that are proposed to be altered or modified. If the project includes more than one dam with associated facilities, each dam and the associated component parts must be described together as a discrete development. The description for each development must contain:

(1) The physical composition, dimensions, and general configuration of any dams, spillways, penstocks, powerhouses, tailraces, or other structures, whether existing or proposed, to be included as part of the project;

(2) The normal maximum surface area and normal maximum surface elevation (mean sea level), gross storage capacity, and usable storage capacity of any impoundments to be included as part of the project;

(3) The number, type, and rated capacity of any turbines or generators, whether existing or proposed, to be included as part of the project;

(4) The number, length, voltage, and interconnections of any primary transmission lines, whether existing or proposed, to be included as part of the project (see 16 U.S.C. 796(11));

(5) The specifications of any additional mechanical, electrical, and transmission equipment appurtenant to the project; and

(6) All lands of the United States that are enclosed within the project boundary described under paragraph (h) of this section (Exhibit G), identified and tabulated by legal subdivisions of a public land survey of the affected area or, in the absence of a public land survey, by the best available legal description. The tabulation must show the total acreage of the lands of the United States within the project boundary.

(c) *Exhibit B* is a statement of project operation and resource utilization. If the project includes more than one dam with associated facilities, the information must be provided separately for each such discrete development. The exhibit must contain:

(1) A statement whether operation of the powerplant will be manual or automatic, an estimate of the annual plant factor, and a statement of how the project will be operated during adverse, mean, and high water years;

(2) An estimate of the dependable capacity and average annual energy production in kilowatt-hours (or a mechanical equivalent), supported by the following data:

(i) The minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, with a specification of any adjustments made for evaporation, leakage, minimum flow releases (including duration of releases), or other reductions in available flow;

monthly flow duration curves indicating the period of record and the gauging stations used in deriving the curves; and a specification of the period of critical streamflow used to determine the dependable capacity;

(ii) An area-capacity curve showing the gross storage capacity and usable storage capacity of the impoundment, with a rule curve showing the proposed operation of the impoundment and how the usable storage capacity is to be utilized;

(iii) The estimated hydraulic capacity of the powerplant (minimum and maximum flow through the powerplant) in cubic feet per second;

(iv) A tailwater rating curve; and

(v) A curve showing powerplant capability versus head and specifying maximum, normal, and minimum heads;

(3) A statement, with load curves and tabular data, if necessary, of the manner in which the power generated at the project is to be utilized, including the amount of power to be used on-site, if any, the amount of power to be sold, and the identity of any proposed purchasers; and

(4) A statement of the applicant's plans, if any, for future development of the project or of any other existing or proposed water power project on the stream or other body of water, indicating the approximate location and estimated installed capacity of the proposed developments.

(d) *Exhibit C* is a construction history and proposed construction schedule for the project. The construction history and schedules must contain:

(1) If the application is for an initial license, a tabulated chronology of construction for the existing projects structures and facilities described under paragraph (b) of this section (Exhibit A), specifying for each structure or facility, to the extent possible, the actual or approximate dates (approximate dates must be identified as such) of:

(i) Commencement and completion of construction or installation;

(ii) Commencement of commercial operation; and

(iii) Any additions or modifications other than routine maintenance; and

(2) If any new development is proposed, a proposed schedule describing the necessary work and specifying the intervals following issuance of a license when the work would be commenced and completed.

(e) *Exhibit D* is a statement of costs and financing. The statement must contain:

(1) If the application is for an initial license, a tabulated statement providing the actual or approximate original cost (approximate costs must be identified as such) of:

(i) Any land or water right necessary to the existing project; and

(ii) Each existing structure and facility described under paragraph (b) of this section (Exhibit A).

(2) If the applicant is a licensee applying for a new license, and is not a municipality or a state, an estimate of the amount which would be payable if the project were to be taken over pursuant to section 14 of the Federal Power Act upon expiration of the license in effect [*see* 16 U.S.C. 807], including:

(i) Fair value;

(ii) Net investment; and

(iii) Severance damages.

(3) If the application includes proposals for any new development, a statement of estimated costs, including:

(i) The cost of any land or water rights necessary to the new development; and

(ii) The cost of the new development work, with a specification of:

(A) Total cost of each major item;

(B) Indirect construction costs such as costs of construction equipment, camps, and commissaries;

(C) Interest during construction; and

(D) Overhead, construction, legal expenses, taxes, administrative and general expenses, and contingencies.

(4) A statement of the estimated average annual cost of the total project as proposed specifying any projected changes in the costs (life-cycle costs) over the estimated financing or licensing period if the applicant takes such changes into account, including:

(i) Cost of capital (equity and debt);

(ii) Local, state, and Federal taxes;

(iii) Depreciation and amortization;

(iv) Operation and maintenance expenses, including interim replacements, insurance, administrative and

general expenses, and contingencies; and

(v) The estimated capital cost and estimated annual operation and maintenance expense of each proposed environmental measure.

(5) A statement of the estimated annual value of project power, based on a showing of the contract price for sale of power or the estimated average annual cost of obtaining an equivalent amount of power (capacity and energy) from the lowest cost alternative source, specifying any projected changes in the cost of power from that source over the estimated financing or licensing period if the applicant takes such changes into account.

(6) A statement specifying the sources and extent of financing and annual revenues available to the applicant to meet the costs identified in paragraphs (e) (3) and (4) of this section.

(7) An estimate of the cost to develop the license application;

(8) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river; and

(9) The estimated average annual increase or decrease in project generation, and the estimated average annual increase or decrease of the value of project power, due to a change in project operations (*i.e.,* minimum bypass flows; limits on reservoir fluctuations).

(f) *Exhibit E* is an Environmental Report. Information provided in the report must be organized and referenced according to the itemized subparagraphs below. *See* §4.38 for consultation requirements. The Environmental Report must contain the following information, *commensurate with the scope of the proposed project:*

(1) *General description of the locale.* The applicant must provide a general description of the environment of the project and its immediate vicinity. The description must include general information concerning climate, topography, wetlands, vegetative cover, land development, population size and density, the presence of any floodplain and the occurrence of flood events in the vicinity of the project, and any other factors important to an understanding of the setting.

(2) *Report on water use and quality.* The report must discuss the consumptive use of project waters and the impact of the project on water quality. The report must be prepared in consultation with the state and Federal agencies with responsibility for management of water quality in the affected stream or other body of water. Consultation must be documented by appending to the report a letter from each agency consulted that indicates the nature, extent, and results of the consultation. The report must include:

(i) A description (including specified volume over time) of existing and proposed uses of project waters for irrigation, domestic water supply, steam-electric plant, industrial, and other consumptive purposes;

(ii) A description of existing water quality in the project impoundment and downstream water affected by the project and the applicable water quality standards and stream segment classifications;

(iii) A description of any minimum flow releases specifying the rate of flow in cubic feet per second (cfs) and duration, changes in the design of project works or in project operation, or other measures recommended by the agencies consulted for the purposes of protecting or improving water quality, including measures to minimize the short-term impacts on water quality of any proposed new development of project works (for any dredging or filling, refer to 40 CFR part 230 and 33 CFR 320.3(f) and 323.3(e))[1];

(iv) A statement of the existing measures to be continued and new measures proposed by the applicant for the purpose of protecting or improving water quality, including an explanation of why the applicant has rejected any measures recommended by an agency and described under paragraph (f)(2)(iii) of this section.

(v) A description of the continuing impact on water quality of continued

[1] 33 CFR part 323 was revised at 47 FR 31810, July 22, 1982, and §323.3(e) no longer exists.

operation of the project and the incremental impact of proposed new development of project works or changes in project operation; and

(3) *Report on fish, wildlife, and botanical resources.* The report must discuss fish, wildlife, and botanical resources in the vicinity of the project and the impact of the project on those resources. The report must be prepared in consultation with any state agency with responsibility for fish, wildlife, and botanical resources, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (if the project may affect anadromous fish resources subject to that agency's jurisdiction), and any other state or Federal agency with managerial authority over any part of the project lands. Consultation must be documented by appending to the report a letter from each agency consulted that indicates the nature, extent, and results of the consultation. The report must include:

(i) A description of the fish, wildlife, and botanical resources of the project and its vicinity, and of downstream areas affected by the project, including identification of any species listed as threatened or endangered by the U.S. Fish and Wildlife Service (*See* 50 CFR 17.11 and 17.12);

(ii) A description of any measures or facilities recommended by the agencies consulted for the mitigation of impacts on fish, wildlife, and botanical resources, or for the protection or improvement of those resources;

(iii) A statement of any existing measures or facilities to be continued or maintained and any measures or facilities proposed by the applicant for the mitigation of impacts on fish, wildlife, and botanical resources, or for the protection or improvement of such resources, including an explanation of why the applicant has rejected any measures or facilities recommended by an agency and described under paragraph (f)(3)(ii) of this section.

(iv) A description of any anticipated continuing impact on fish, wildlife, and botanical resources of continued operation of the project, and the incremental impact of proposed new development of project works or changes in project operation; and

(v) The following materials and information regarding the measures and facilities identified under paragraph (f)(3)(iii) of this section:

(A) Functional design drawings of any fish passage and collection facilities, indicating whether the facilities depicted are existing or proposed (these drawings must conform to the specifications of § 4.39 regarding dimensions of full-sized prints, scale, and legibility);

(B) A description of operation and maintenance procedures for any existing or proposed measures or facilities;

(C) An implementation or construction schedule for any proposed measures or facilities, showing the intervals following issuance of a license when implementation of the measures or construction of the facilities would be commenced and completed;

(D) An estimate of the costs of construction, operation, and maintenance, of any proposed facilities, and of implementation of any proposed measures, including a statement of the sources and extent of financing; and

(E) A map or drawing that conforms to the size, scale, and legibility requirements of § 4.39 showing by the use of shading, cross-hatching, or other symbols the identity and location of any measures or facilities, and indicating whether each measure or facility is existing or proposed (the map or drawings in this exhibit may be consolidated).

(4) *Report on historical and archeological resources.* The report must discuss the historical and archeological resources in the project area and the impact of the project on those resources. The report must be prepared in consultation with the State Historic Preservation Officer and the National Park Service. Consultation must be documented by appending to the report a letter from each agency consulted that indicates the nature, extent, and results of the consultation. The report must contain:

(i) Identification of any sites either listed or determined to be eligible for inclusion in the National Register of Historic Places that are located in the project area, or that would be affected by operation of the project or by new

development of project facilities (including facilities proposed in this exhibit);

(ii) A description of any measures recommended by the agencies consulted for the purpose of locating, identifying, and salvaging historical or archaeological resources that would be affected by operation of the project, or by new development of project facilities (including facilities proposed in this exhibit), together with a statement of what measures the applicant proposes to implement and an explanation of why the applicant rejects any measures recommended by an agency.

(iii) The following materials and information regarding the survey and salvage activities described under paragraph (f)(4)(ii) of this section:

(A) A schedule for the activities, showing the intervals following issuance of a license when the activities would be commenced and completed; and

(B) An estimate of the costs of the activities, including a statement of the sources and extent of financing.

(5) *Report on recreational resources.* The report must discuss existing and proposed recreational facilities and opportunities at the project. The report must be prepared in consultation with local, state, and regional recreation agencies and planning commissions, the National Park Service, and any other state or Federal agency with managerial authority over any part of the project lands. Consultation must be documented by appending to the report a letter from each agency consulted indicating the nature, extent, and results of the consultation. The report must contain:

(i) A description of any existing recreational facilities at the project, indicating whether the facilities are available for public use;

(ii) An estimate of existing and potential recreational use of the project area, in daytime and overnight visits;

(iii) A description of any measures or facilities recommended by the agencies consulted for the purpose of creating, preserving, or enhancing recreational opportunities at the project and in its vicinity (including opportunities for the handicapped), and for the purpose of ensuring the safety of the public in its use of project lands and waters;

(iv) A statement of the existing measures or facilities to be continued or maintained and the new measures or facilities proposed by the applicant for the purpose of creating, preserving, or enhancing recreational opportunities at the project and in its vicinity, and for the purpose of ensuring the safety of the public in its use of project lands and waters, including an explanation of why the applicant has rejected any measures or facilities recommended by an agency and described under paragraph (f)(5)(iii) of this section; and

(v) The following materials and information regarding the measures and facilities identified under paragraphs (f)(5) (i) and (iv) of this section:

(A) Identification of the entities responsible for implementing, constructing, operating, or maintaining any existing or proposed measures or facilities;

(B) A schedule showing the intervals following issuance of a license at which implementation of the measures or construction of the facilities would be commenced and completed;

(C) An estimate of the costs of construction, operation, and maintenance of any proposed facilities, including a statement of the sources and extent of financing;

(D) A map or drawing that conforms to the size, scale, and legibility requirements of §4.39 showing by the use of shading, cross-hatching, or other symbols the identity and location of any facilities, and indicating whether each facility is existing or proposed (the maps or drawings in this exhibit may be consolidated); and

(vi) A description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in, the National Wild and Scenic Rivers System, or that have been designated as wilderness area, recommended for such designation, or designated as a wilderness study area under the Wilderness Act.

(6) *Report on land management and aesthetics.* The report must discuss the

management of land within the proposed project boundary, including wetlands and floodplains, and the protection of the recreational and scenic values of the project. The report must be prepared following consultation with local and state zoning and land management authorities and any Federal or state agency with managerial authority over any part of the project lands. Consultation must be documented by appending to the report a letter from each agency consulted indicating the nature, extent, and results of the consultation. The report must contain:

(i) A description of existing development and use of project lands and all other lands abutting the project impoundment;

(ii) A description of the measures proposed by the applicant to ensure that any proposed project works, rights-of-way, access roads, and other topographic alterations blend, to the extent possible, with the surrounding environment; (*see, e.g.*, 44 F.P.C. 1496, *et seq.*);

(iii) A description of wetlands or floodplains within, or adjacent to, the project boundary, any short-term or long-term impacts of the project on those wetlands or floodplains, and any mitigative measures in the construction or operation of the project that minimize any adverse impacts on the wetlands or floodplains;

(iv) A statement, including an analysis of costs and other constraints, of the applicant's ability to provide a buffer zone around all or any part of the impoundment, for the purpose of ensuring public access to project lands and waters and protecting the recreational and aesthetic values of the impoundment and its shoreline;

(v) A description of the applicant's policy, if any, with regard to permitting development of piers, docks, boat landings, bulkheads, and other shoreline facilities on project lands and waters; and

(vi) Maps or drawings that conform to the size, scale and legibility requirements of §4.39, or photographs, sufficient to show the location and nature of the measures proposed under paragraph (f)(6)(ii) of this section (maps or drawings in this exhibit may be consolidated).

(7) *List of literature*. The report must include a list of all publications, reports, and other literature which were cited or otherwise utilized in the preparation of any part of the environmental report.

(g) Exhibit F. *See* §4.41(g) of this chapter.

(h) Exhibit G. *See* §4.41(h) of this chapter.

[Order 141, 12 FR 8485, Dec. 19, 1947, as amended by Order 123, 46 FR 9029, Jan. 28, 1981; Order 183, 46 FR 55251, Nov. 9, 1981; Order 184, 46 FR 55942, Nov. 13, 1981; Order 413, 50 FR 11684, Mar. 25, 1985; Order 464, 52 FR 5449, Feb. 23, 1987; Order 540, 57 FR 21737, May 22, 1992; Order 2002, 68 FR 51120, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003]

Subpart G—Application for License for Minor Water Power Projects and Major Water Power Projects 5 Megawatts or Less

§4.60 Applicability and notice to agencies.

(a) *Applicability*. The provisions of this subpart apply to any application for an initial license or a new license for:

(1) A minor water power project, as defined in §4.30(b)(17);

(2) Any major project—existing dam, as defined in §4.30(b)(16), that has a total installed capacity of 5 MW or less; or

(3) Any major unconstructed project or major modified project, as defined in §4.30 (b) (15) and (14) respectively, that has a total installed capacity of 5 MW or less.

(b) *Notice to agencies*. The Commission will supply interested Federal, state, and local agencies with notice of any application for license for a water power project 5 MW or less and request comment on the application. Copies of the application will be available for inspection at the Commission's Public Reference Room. The applicant shall also furnish copies of the filed application to any Federal, state, or local agency that so requests.

(c) Unless an applicant for a license for a minor water power project requests in its application that the Commission apply the following provisions of Part I of the Federal Power Act when it issues a minor license for a project, the Commission, unless it determines it would not be in the public interest to do so, will waive:

(1) Section 4(b), insofar as it requires a licensee to file a statement showing the actual legitimate costs of construction of a project;

(2) Section 4(e), insofar as it relates to approval by the Chief of Engineers and the Secretary of the Army of plans affecting navigation;

(3) Section 6, insofar as it relates to the acceptance and expression in the license of terms and conditions of the Federal Power Act that are waived in the licensing order;

(4) Section 10(c), insofar as it relates to a licensee's maintenance of depreciation reserves;

(5) Sections 10(d) and 10(f);

(6) Section 14, with the exception of the right of the United States or any state or municipality to take over, maintain, and operate a project through condemnation proceedings; and

(7) Sections 15, 16, 19, 20 and 22.

[Order 413, 50 FR 11685, Mar. 25, 1985, as amended by Order 513, 54 FR 23806, June 2, 1989; Order 2002, 68 FR 51120, Aug. 25, 2003]

§4.61 Contents of application.

(a) *General instructions*—(1) *Entry upon land.* No work may be started on any proposed project works until the applicant receives a signed license from the Commission. Acceptance of an application does not authorize entry upon public lands or reservations of the United States for any purpose. The applicant should determine whether any additional Federal, state, or local permits are required.

(2) Exhibits F and G must be submitted on separate drawings. Drawings for Exhibits F and G must have identifying title blocks and bear the following certification: ''This drawing is a part of the application for license made by the undersigned this _____ day of _____, 19____.''

(3) Each application for a license for a water power project 5 megawatts or less must include the information requested in the initial statement and lettered exhibits described by paragraphs (b) through (f) of this section, and must be provided in the form specified. The Commission reserves the right to require additional information, or another filing procedure, if data provided indicate such action to be appropriate.

(b) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for License for a [Minor Water Power Project, or Major Water Power Project, 5 Megawatts or Less, as Appropriate]

(1) _____ (Name of Applicant) applies to the Federal Energy Regulatory Commission for _____ (license or new license, as appropriate) for the _____ (name of project) water power project, as described hereinafter. (Specify any previous FERC project number designation.)

(2) The location of the project is:

State or territory: _____

County: _____

Township or nearby town: _____

Stream or other body of water: _____

(3) The exact name, address, and telephone number of the applicant are:

_____

_____

_____

(4) The exact name, address, and telephone number of each person authorized to act as agent for the applicant in this application, if applicable, are:

_____

_____

_____

(5) The applicant is a _____ [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or State, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

(6)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed with respect to bed and banks and the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act, are: [provide citation and brief identification of the nature of each requirement; if the applicant is a municipality, the applicant must submit copies of applicable state or local laws or a municipal charter or, if such laws or documents are not

clear, any other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power.]

(ii) The steps which the applicant has taken or plans to take to comply with each of the laws cited above are: [provide brief description for each requirement]

(7) Brief project description

(i) Proposed installed generating capacity _____ MW.

(ii) Check appropriate box:

☐ existing dam ☐ unconstructed dam

☐ existing dam, major modified project (see § 4.30(b)(14))

(8) Lands of the United States affected (shown on Exhibit G):

	(Name)	(Acres)
(i) National Forest	.....	.....
(ii) Indian Reservation.	.....	.....
(iii) Public Lands Under Jurisdiction of.	.....	.....
(iv) Other	.....	.....
(v) Total U.S. Lands	.....	.....

(vi) Check appropriate box:

☐ Surveyed land ☐ Unsurveyed land

(9) Construction of the project is planned to start within ____ months, and is planned to be completed within ____ months, from the date of issuance of license.

(c) *Exhibit A* is a description of the project and the proposed mode of operation.

(1) The exhibit must include, in tabular form if possible, as appropriate:

(i) The number of generating units, including auxiliary units, the capacity of each unit, and provisions, if any, for future units;

(ii) The type of hydraulic turbine(s);

(iii) A description of how the plant is to be operated, manual or automatic, and whether the plant is to be used for peaking;

(iv) The estimated average annual generation in kilowatt-hours or mechanical energy equivalent;

(v) The estimated average head on the plant;

(vi) The reservoir surface area in acres and, if known, the net and gross storage capacity;

(vii) The estimated minimum and maximum hydraulic capacity of the plant (flow through the plant) in cubic feet per second and estimated average flow of the stream or water body at the plant or point of diversion; for projects with installed capacity of more than 1.5 megawatts, monthly flow duration curves and a description of the drainage area for the project site must be provided;

(viii) Sizes, capacities, and construction materials, as appropriate, of pipelines, ditches, flumes, canals, intake facilities, powerhouses, dams, transmission lines, and other appurtenances; and

(ix) The estimated cost of the project.

(x) The estimated capital costs and estimated annual operation and maintenance expense of each proposed environmental measure.

(2) State the purposes of project (for example, use of power output).

(3) An estimate of the cost to develop the license application; and

(4) The on-peak and off-peak values of project power, and the basis for estimating the values, for projects which are proposed to operate in a mode other than run-of-river.

(5) The estimated average annual increase or decrease in project generation, and the estimated average annual increase or decrease of the value of project power due to a change in project operations (*i.e.*, minimum bypass flows, limiting reservoir fluctuations) for an application for a new license;

(6) The remaining undepreciated net investment, or book value of the project;

(7) The annual operation and maintenance expenses, including insurance, and administrative and general costs;

(8) A detailed single-line electrical diagram;

(9) A statement of measures taken or planned to ensure safe management, operation, and maintenance of the project.

(d) *Exhibit E* is an Environmental Report.

(1) For major unconstructed and major modified projects 5 MW or less. Any application must contain an Exhibit E conforming with the data and consultation requirements of § 4.41(f) of this chapter, if the application is for license for a water power project which has or is proposed to have a total installed generating capacity greater

than 1.5 MW but not greater than 5 MW, and which:

(i) Would use the water power potential of a dam and impoundment which, at the time of application, has not been constructed (*see* §4.30(b)(15)); or

(ii) Involves any repair, modification or reconstruction of an existing dam that would result in a significant change in the normal maximum surface area or elevation of an existing impoundment or involves any change in existing project works or operations that would result in a significant environmental impact (*see* §4.30(b)(14)).

(2) *For minor projects and major projects at existing dams 5 MW or less.* An application for license for either a minor water power project with a total proposed installed generating capacity of 1.5 MW or less or a major project—existing dam with a proposed total installed capacity of 5 MW or less must contain an Exhibit E under this subparagraph. *See* §4.38 for consultation requirements. The Environmental Report must contain the following information:

(i) A description, including any maps or photographs which the applicant considers appropriate, of the environmental setting of the project, including vegetative cover, fish and wildlife resources, water quality and quantity, land and water uses, recreational uses, historical and archeological resources, and scenic and aesthetic resources. The report must include a discussion of endangered or threatened plant and animal species, any critical habitats, and any sites included in, or eligible for inclusion in, the National Register of Historic Places. The applicant may obtain assistance in the preparation of this information from state natural resources agencies, the state historic preservation officer, and from local offices of Federal natural resources agencies.

(ii) A description of the expected environmental impacts from proposed construction or development and the proposed operation of the power project, including any impacts from any proposed changes in the capacity and mode of operation of the project if it is already generating electric power, and an explanation of the specific measures proposed by the applicant, the agencies, and others to protect and enhance environmental resources and values and to mitigate adverse impacts of the project on such resources. The applicant must explain its reasons for not undertaking any measures proposed by any agency consulted.

(iii) A description of the steps taken by the applicant in consulting with Federal, state, and local agencies with expertise in environmental matters during the preparation of this exhibit prior to filing the application for license with the Commission. In this report, the applicant must:

(A) Indicate which agencies were consulted during the preparation of the environmental report and provide copies of letters or other documentation showing that the applicant consulted or attempted to consult with each of the relevant agencies (specifying each agency) before filing the application, including any terms or conditions of license that those agencies have determined are appropriate to prevent loss of, or damage to, natural resources; and

(B) List those agencies that were provided copies of the application as filed with the Commission, the date or dates provided, and copies of any letters that may be received from agencies commenting on the application.

(iv) Any additional information the applicant considers important.

(e) *Exhibit F.* See §4.41(g) of this chapter.

(f) *Exhibit G.* See §4.41(h) of this chapter.

[Order 185, 46 FR 55949, Nov. 13, 1981, as amended by Order 413, 50 FR 11685, Mar. 25, 1985; Order 464, 52 FR 5449, Feb. 23, 1987; Order 513, 54 FR 23806, June 2, 1989; Order 2002, 68 FR 51120, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003]

Subpart H—Application for License for Transmission Line Only

§4.70 Applicability.

This subpart applies to any application for license issued solely for a transmission line that transmits power from a licensed water power project to

the point of junction with the distribution system or with the interconnected primary transmission system.

[Order 184, 46 FR 55942, Nov. 13, 1981, as amended by Order 2002, 68 FR 51120, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003]

§ 4.71 Contents of application.

An application for license for transmission line only must contain the following information in the form specified.

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATION COMMISSION

Application for License for Transmission Line Only

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for a [license or new license, as appropriate] for the [name of project] transmission line only, as described in the attached exhibits, that is connected with FERC Project No. _____, for which a license [was issued, or application was made, as appropriate] on the _____ day of _____, 19___.

(2) The location of the transmission line would be:
State or territory: _____
County: _____
Township or nearby town: _____

(3) The proposed use or market for the power to be transmitted.

(4) The exact name, business address, and telephone number of the applicant are:

_____
_____
_____

(5) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or State, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. *See* 16 U.S.C. 796.

(6)(i) [For any applicant which, at the time of application for license for transmission line only, is a non-licensee.] The statutory or regulatory requirements of the state(s) in which the project would be located and that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distribution power and in any other business necessary to accomplish the purposes of the license under the Federal Power Act, are: [provide citation and brief identification of the nature of each requirement; if the applicant is a municipality, the applicant must submit copies of applicable state or local laws or a municipal charter or, if such laws or documents are not clear, other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of developing, transmitting, utilizing, or distributing power.]

(ii) [For any applicant which, at the time of application for license for transmission line only, is a licensee.] The statutory or regulatory requirements of the state(s) in which the transmission line would be located and that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes, are: [provide citations and brief identification of the nature of each requirement.]

(iii) The steps which the applicant has taken or plans to take to comply with each of the laws cited above are: [provide brief descriptions for each law.]

(b) *Required exhibits.* The application must contain the following exhibits, as appropriate:

(1) For any transmission line that, at the time the application is filed, is not constructed and is proposed to be connected to a licensed water power project with an installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.41 of this chapter;

(2) For any transmission line that, at the time the application is filed, is not constructed and is proposed to be connected to a licensed water power project with an installed generating capacity of 5 MW or less—Exhibits E, F, and G under § 4.61 of this chapter; and

(3) For any transmission line that, at the time the application is filed, has been constructed and is proposed to be connected to any licensed water power project—Exhibits E, F, and G under § 4.61 of this chapter.

[Order 184, 46 FR 55942, Nov. 13, 1981, as amended by Order 413, 50 FR 11685, Mar. 25, 1985]

Subpart I—Application for Preliminary Permit; Amendment and Cancellation of Preliminary Permit

AUTHORITY: Federal Power Act, as amended 16 U.S.C. 792–828c; Department of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009, 42 FR 46267; Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645, unless otherwise noted.

§4.80 Applicability.

Sections 4.80 through 4.83 pertain to preliminary permits under Part I of the Federal Power Act. The sole purpose of a preliminary permit is to secure priority of application for a license for a water power project under Part I of the Federal Power Act while the permittee obtains the data and performs the acts required to determine the feasibility of the project and to support an application for a license.

[Order 54, 44 FR 61336, Oct. 25, 1979, as amended by Order 413, 50 FR 11685, Mar. 25, 1985]

§4.81 Contents of application.

Each application for a preliminary permit must include the following initial statement and numbered exhibits containing the information and documents specified:

(a) *Initial statement:*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Preliminary Permit

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for a preliminary permit for the proposed [name of project] water power project, as described in the attached exhibits. This application is made in order that the applicant may secure and maintain priority of application for a license for the project under Part I of the Federal Power Act while obtaining the data and performing the acts required to determine the feasibility of the project and to support an application for a license.

(2) The location of the proposed project is:

State or territory: _____
County: _____
Township or nearby town: _____
Stream or other body of water: _____

(3) The exact name, business address, and telephone number of the applicant are:

The exact name and business address of each person authorized to act as agent for the applicant in this application are:

(4) [Name of applicant] is a [citizen, association, citizens, domestic corporation, municipality, or State, as appropriate] and (is/is not) claiming preference under section 7(a) of the Federal Power Act. [If the applicant is a municipality, the applicant must submit copies of applicable state or local laws or a municipal charter or, if such laws or documents are not clear, any other appropriate legal authority, evidencing that the municipality is competent under such laws to engage in the business of development, transmitting, utilizing, or distributing power].

(5) The proposed term of the requested permit is [period not to exceed 36 months].

(6) If there is any existing dam or other project facility, the applicant must provide the name and address of the owner of the dam and facility. If the dam is federally owned or operated, provide the name of the agency.

(b) *Exhibit 1* must contain a description of the proposed project, specifying and including, *to the extent possible:*

(1) The number, physical composition, dimensions, general configuration and, where applicable, age and condition, of any dams, spillways, penstocks, powerhouses, tailraces, or other structures, whether existing or proposed, that would be part of the project;

(2) The estimated number, surface area, storage capacity, and normal maximum surface elevation (mean sea level) of any reservoirs, whether existing or proposed, that would be part of the project;

(3) The estimated number, length, voltage, interconnections, and, where applicable, age and condition, of any primary transmission lines whether existing or proposed, that would be part of the project [*see* 16 U.S.C. 796(11)];

(4) The total estimated average annual energy production and installed capacity (provide only one energy and capacity value), the hydraulic head for estimating capacity and energy output, and the estimated number, rated capacity, and, where applicable, the age and condition, of any turbines and generators, whether existing or proposed, that would be part of the project works;

(5) All lands of the United States that are enclosed within the proposed project boundary described under paragraph (e)(3) of this section, identified and tabulated on a separate sheet by legal subdivisions of a public land survey of the affected area, if available. If the project boundary includes lands of the United States, such lands must be identified on a completed land description form, provided by the Commission.

The project location must identify any Federal reservation, Federal tracts, and townships of the public land surveys (or official protractions thereof if unsurveyed). A copy of the form must also be sent to the Bureau of Land Management state office where the project is located;

(6) Any other information demonstrating in what manner the proposed project would develop, conserve, and utilize in the public interest the water resources of the region.

(c) *Exhibit 2* is a description of studies conducted or to be conducted with respect to the proposed project, including field studies. Exhibit 2 must supply the following information:

(1) *General requirement.* For any proposed project, a study plan containing a description of:

(i) Any studies, investigations, tests, or surveys that are proposed to be carried out, and any that have already taken place, for the purposes of determining the technical, economic, and financial feasibility of the proposed project, taking into consideration its environmental impacts, and of preparing an application for a license for the project; and

(ii) The approximate locations and nature of any new roads that would be built for the purpose of conducting the studies; and

(2) *Work plan for new dam construction.* For any development within the project that would entail new dam construction, a work plan and schedule containing:

(i) A description, including the approximate location, of any field study, test, or other activity that may alter or disturb lands or waters in the vicinity of the proposed project, including floodplains and wetlands; measures that would be taken to minimize any such disturbance; and measures that would be taken to restore the altered or disturbed areas; and

(ii) A proposed schedule (a chart or graph may be used), the total duration of which does not exceed the proposed term of the permit, showing the intervals at which the studies, investigations, tests, and surveys, identified under this paragraph are proposed to be completed.

(iii) For purposes of this paragraph, *new dam construction* means any dam construction the studies for which would require test pits, borings, or other foundation exploration in the field.

(3) *Waiver.* The Commission may waive the requirements of paragraph (c)(2) pursuant to §385.207 of this chapter, upon a showing by the applicant that the field studies, tests, and other activities to be conducted under the permit would not adversely affect cultural resources or endangered species and would cause only minor alterations or disturbances of lands and waters, and that any land altered or disturbed would be adequately restored.

(4) *Exhibit 2* must contain a statement of costs and financing, specifying and including, *to the extent possible:*

(i) The estimated costs of carrying out or preparing the studies, investigations, tests, surveys, maps, plans or specifications identified under paragraph (c) of this section;

(ii) The expected sources and extent of financing available to the applicant to carry out or prepare the studies, investigations, tests, surveys, maps, plans, or specifications identified under paragraph (c) of this section; and

(d) *Exhibit 3* must include a map or series of maps, to be prepared on United States Geological Survey topographic quadrangle sheets or similar topographic maps of a State agency, if available. *The maps need not conform to the precise specifications of §4.39 (a) and (b).* If the scale of any base map is not sufficient to show clearly and legibly all of the information required by this paragraph, the maps submitted must be enlarged to a scale that is adequate for that purpose. (If Exhibit 4 comprises a series of maps, it must also include an index sheet showing, by outline, the parts of the entire project covered by each map of the series.) The maps must show:

(1) The location of the project as a whole with reference to the affected stream or other body of water and, if possible, to a nearby town or any permanent monuments or objects that can be noted on the maps and recognized in the field;

(2) The relative locations and physical interrelationships of the principal

project features identified under paragraph (b) of this section;

(3) A proposed boundary for the project, enclosing:

(i) All principal project features identified under paragraph (b) of this section, including but not limited to any dam, reservoir, water conveyance facilities, powerplant, transmission lines, and other appurtenances; if the project is located at an existing Federal dam, the Federal dam and impoundment must be shown, but may not be included within the project boundary;

(ii) Any non-Federal lands and any public lands or reservations of the United States [*see* 16 U.S.C. 796 (1) and (2)] necessary for the purposes of the project. To the extent that those public lands or reservations are covered by a public land survey, the project boundary must enclose each of and only the smallest legal subdivisions (quarter-quarter section, lots, or other subdivisions, identified on the map by subdivision) that may be occupied in whole or in part by the project.

(4) Areas within or in the vicinity of the proposed project boundary which are included in or have been designated for study for inclusion in the National Wild and Scenic Rivers System; and

(5) Areas within the project boundary that, under the provisions of the Wilderness Act, have been:

(i) Designated as wilderness area;

(ii) Recommended for designation as wilderness area; or

(iii) Designated as wilderness study area.

(Federal Power Act, as amended, 16 U.S.C. 792–828c (1976); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (Supp. IV 1980); E.O. 12009, 3 CFR part 142 (1978); 5 U.S.C. 553 (Supp. IV 1980))

[Order 54, 44 FR 61336, Oct. 25, 1979, as amended by Order 123, 46 FR 9029, Jan. 28, 1981; 46 FR 11811, Feb. 11, 1981; Order 225, 47 FR 19056, May 3, 1982; Order 413, 50 FR 11685, Mar. 25, 1985; Order 2002, 68 FR 51120, Aug. 25, 2003; Order 655, 70 FR 33828, June 10, 2005]

§ 4.82 Amendments.

(a) Any permittee may file an application for amendment of its permit, including any extension of the term of the permit that would not cause the total term to exceed three years. (Transfer of a permit is prohibited by section 5 of the Federal Power Act.) Each application for amendment of a permit must conform to any relevant requirements of § 4.81 (b), (c), (d), and (e).

(b) If an application for amendment of a preliminary permit requests any material change in the proposed project, public notice of the application will be issued as required in § 4.32(d)(2)(i).

(c) If an application to extend the term of a permit is submitted not less than 30 days prior to the termination of the permit, the permit term will be automatically extended (not to exceed a total term for the permit of three years) until the Commission acts on the application for an extension. The Commission will not accept extension requests that are filed less than 30 days prior to the termination of the permit.

[Order 413, 50 FR 11685, Mar. 25, 1985, as amended by Order 499, 53 FR 27002, July 18, 1988]

§ 4.83 Cancellation and loss of priority.

(a) The Commission may cancel a preliminary permit after notice and opportunity for hearing if the permittee fails to comply with the specific terms and conditions of the permit. The Commission may also cancel a permit for other good cause shown after notice and opportunity for hearing. Cancellation of a permit will result in loss of the permittee's priority of application for a license for the proposed project.

(b) Failure of a permittee to file an acceptable application for a license before the permit expires will result in loss of the permittee's priority of application for a license for the proposed project.

[Order 413, 50 FR 11686, Mar. 25, 1985]

§ 4.84 Surrender of permit.

A permittee must submit a petition to the Commission before the permittee may voluntarily surrender its permit. Unless the Commission issues an order to the contrary, the permit will remain in effect through the thirtieth day after the Commission issues a public notice of receipt of the petition.

[Order 413, 50 FR 11686, Mar. 25, 1985]

Subpart J—Exemption of Small Conduit Hydroelectric Facilities

§ 4.90 Applicability and purpose.

This subpart implements section 30 of the Federal Power Act and provides procedures for obtaining an exemption for constructed or unconstructed small conduit hydroelectric facilities, as defined in § 4.30(b)(28), from all or part of the requirements of Part I of the Federal Power Act, including licensing, and the regulations issued under Part I.

[Order 76, 45 FR 28090, Apr. 28, 1980, as amended by Order 413, 50 FR 11686, Mar. 25, 1985; Order 2002, 68 FR 51121, Aug. 25, 2003]

§ 4.91 [Reserved]

§ 4.92 Contents of exemption application.

(a) An application for exemption for this subpart must include:

(1) An introductory statement, including a declaration that the facility for which application is made meets the requirements of § 4.30(b)(28), the facility qualifies but for the discharge requirement of § 4.30(b)(28)(v), the introductory statement must identify that fact and state that the application is accompanied by a petition for waiver of § 4.30(b)(28)(v), filed pursuant to § 385.207 of this chapter);

(2) Exhibits A, E, F, and G.

(3) An appendix containing documentary evidence showing that the applicant has the real property interests required under § 4.31(b); and

(4) Identification of all Indian tribes that may be affected by the project.

(b) *Introductory Statement.* The introductory statement must be set forth in the following format:

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Exemption for Small Conduit Hydroelectric Facility

[Name of applicant] applies to the Federal Energy Regulatory Commission for an exemption for the [name of facility], a small conduit hydroelectric facility that meets the requirements of [insert the following language, as appropriate: ''§ 4.30(b)(28) of this subpart'' or ''§ 4.30(b)(28) of this subpart, except paragraph (b)(26)(v)''], from certain provisions of Part I of the Federal Power Act.

The location of the facility is:

State or Territory: _____

County: _____

Township or nearby town: _____

The exact name and business address of each applicant is:

_____

The exact name and business address of each person authorized to act as agent for the applicant in this application is:

_____

[Name of applicant] is [a citizen of the United States, an association of citizens of the United States, a municipality, State, or a corporation incorporated under the laws of (specify the United States or the state of incorporation, as appropriate), as appropriate].

The provisions of Part I of the Federal Power Act for which exemption is requested are:

[List here all sections or subsections for which exemption is requested.]

[If the facility does not meet the requirement of § 4.30(b)(28)(v), add the following sentence: ''This application is accompanied by a petition for waiver of § 4.30(b)(28)(v), submitted pursuant to 18 CFR 385.207.'']

(c) *Exhibit A.* Exhibit A must describe the small conduit hydroelectric facility and proposed mode of operation with appropriate references to Exhibits F and G. To the extent feasible the information in this exhibit may be submitted in tabular form. The following information must be included:

(1) A brief description of any conduits and associated consumptive water supply facilities, intake facilities, powerhouses, and any other structures associated with the facility.

(2) The proximate natural sources of water that supply the related conduit.

(3) The purposes for which the conduit is used.

(4) The number of generating units, including auxiliary units, the capacity of each unit, and provisions, if any, for future units.

(5) The type of each hydraulic turbine.

(6) A description of how the plant is to be operated, manually or automatically, and whether the plant is to be used for peaking.

(7) Estimations of:

(i) The average annual generation in kilowatt hours;

(ii) The average head of the plant;

(iii) The hydraulic capacity of the plant (flow through the plant) in cubic feet per second;

(iv) The average flow of the conduit at the plant or point of diversion (using best available data and explaining the sources of the data and the method of calculation); and

(v) The average amount of the flow described in paragraph (c)(7)(iv) of this section available for power generation.

(8) The planned date for beginning construction of the facility.

(9) If the hydroelectric facility discharges directly into a natural body of water and a petition for waiver of §4.30(b)(28)(v) has not been submitted, evidence that a quantity of water equal to or greater than the quantity discharged from the hydroelectric facility is withdrawn from that water body downstream into a conduit that is part of the same water supply system as the conduit on which the hydroelectric facility is located.

(10) If the hydroelectric facility discharges directly to a point of agricultural, municipal, or industrial consumption, a description of the nature and location of that point of consumption.

(11) A description of the nature and extent of any construction of a dam that would occur in association with construction of the proposed small conduit hydroelectric facility, including a statement of the normal maximum surface area and normal maximum surface elevation of any existing impoundment before and after that construction; and any evidence that the construction would occur for agricultural, municipal, or industrial consumptive purposes even if hydroelectric generating facilities were not installed.

(d) *Exhibit G.* Exhibit G is a map of the project and boundary and must conform to the specifications of §4.41(h) of this chapter.

(e) *Exhibit E.* This exhibit is an Environmental Report. It must be prepared pursuant to §4.38 and must include the following information, commensurate with the scope and environmental impact of the facility's construction and operation:

(1) A description of the environmental setting in the vicinity of the facility, including vegetative cover, fish and wildlife resources, water quality and quantity, land and water uses, recreational use, socio-economic conditions, historical and archeological resources, and visual resources. The report must give special attention to endangered or threatened plant and animal species, critical habitats, and sites eligible for or included on the National Register of Historic Places. The applicant may obtain assistance in the preparation of this information from State natural resources agencies, the State historic preservation officer, and from local offices of Federal natural resources agencies.

(2) A description of the expected environmental impacts resulting from the continued operation of an existing small conduit hydroelectric facility, or from the construction and operation of a proposed small conduit hydroelectric facility, including a discussion of the specific measures proposed by the applicant and others to protect and enhance environmental resources and to mitigate adverse impacts of the facility on them.

(3) A description of alternative means of obtaining an amount of power equivalent to that provided by the proposed or existing facility.

(4) Any additional information the applicant considers important.

(f) *Exhibit F.* Exhibit F is a set of drawings showing the structures and equipment of the small conduit hydroelectric facility and must conform to the specifications of §4.41(g) of this chapter.

[Order 76, 45 FR 28090, Apr. 28, 1980, as amended by Order 413, 50 FR 11686, Mar. 25, 1985; Order 533, 56 FR 23153, May 20, 1991; Order 2002, 68 FR 51121, Aug. 25, 2003]

§4.93 Action on exemption applications.

(a) An application for exemption that does not meet the eligibility requirements of §4.30(b)(28)(v) may be accepted, provided the application has been accompanied by a request for waiver under §4.92(a)(1) and the waiver request has not been denied. Acceptance of an application that has been accompanied by a request for waiver under §4.92(a)(1) does not constitute a ruling on the waiver request, unless expressly stated in the acceptance.

(b) The Commission will circulate a notice of application for exemption to interested agencies and Indian tribes at the time the applicant is notified that the application is accepted for filing.

(c) In granting an exemption the Commission may prescribe terms or conditions in addition to those set forth in § 4.94, in order to:

(1) Protect the quality or quantity of the related water supply for agricultural, municipal, or industrial consumption;

(2) Otherwise protect life, health, or property;

(3) Avoid or mitigate adverse environmental impact; or

(4) Conserve, develop, or utilize in the public interest the water power resources of the region.

(d) *Conversion to license application.* (1) If an application for exemption under this subpart is denied by the Commission, the applicant may convert the exemption application into an application for license for the hydroelectric project.

(2) The applicant must provide the Commission with written notification, within 30 days after the date of issuance of the order denying exemption, that it intends to convert the exemption application into a license application. The applicant must submit to the Commission, no later than 90 days after the date of issuance of the order denying exemption, additional information that is necessary to conform the exemption application to the relevant regulations for a license application.

(3) If all the information timely submitted is found sufficient, together with the application for exemption, to conform to the relevant regulations for a license application, the converted application will be considered *accepted for filing* as of the date that the exemption application was accepted for filing.

[Order 76, 45 FR 28090, Apr. 28, 1980, as amended by Order 413, 50 FR 11687, Mar. 25, 1985; Order 533, 56 FR 23153, May 20, 1991; Order 2002, 68 FR 51121, Aug. 25, 2003]

§ 4.94 Standard terms and conditions of exemption.

Any exemption granted under § 4.93 for a small conduit hydroelectric facility is subject to the following standard terms and conditions:

(a) *Article 1.* The Commission reserves the right to conduct investigations under sections 4(g), 306, 307, and 311 of the Federal Power Act with respect to any acts, complaints, facts, conditions, practices, or other matters related to the construction, operation, or maintenance of the exempt facility. If any term or condition of the exemption is violated, the Commission may revoke the exemption, issue a suitable order under section 4(g) of the Federal Power Act, or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.

(b) *Article 2.* The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that the United States Fish and Wildlife Service, the National Marine Fisheries Service, and any state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or otherwise to carry out the purposes of the Fish and Wildlife Coordination Act, as specified in exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of exemption application.

(c) *Article 3.* The Commission may revoke this exemption if actual construction of any proposed generating facilities has not begun within two years or has not been completed within four years from the effective date of this exemption. If an exemption is revoked under this article, the Commission will not accept from the prior exemption holder a subsequent application for exemption from licensing or a notice of exemption from licensing for the same project within two years of the revocation.

(d) *Article 4.* In order to best develop, conserve, and utilize in the public interest the water resources of the region, the Commission may require that the exempt facilities be modified in structure or operation or may revoke this exemption.

(e) *Article 5.* The Commission may revoke this exemption if, in the application process, material discrepancies,

inaccuracies, or falsehoods were made by or on behalf of the applicant.

(f) *Article 6.* Before transferring any property interests in the exempt project, the exemption holder must inform the transferee of the terms and conditions of the exemption. Within 30 days of transferring the property interests, the exemption holder must inform the Commission of the identity and address of the transferee.

[Order 76, 45 FR 28090, Apr. 28, 1980, as amended by Order 413, 50 FR 11687, Mar. 25, 1985; Order 413–A, 56 FR 31331, July 10, 1991]

§4.95 Surrender of exemption.

(a) To voluntarily surrender its exemption, a holder of an exemption for a small conduit hydroelectric facility must file a petition with the Commission.

(b)(1) If construction has begun, prior to filing a petition with the Commission, the exemption holder must consult with the fish and wildlife agencies in accordance with §4.38, substituting for the information required under §4.38(b)(1) information appropriate to the disposition and restoration of the project works and lands. The petition must set forth the exemption holder's plans with respect to disposition and restoration of the project works and lands.

(2) If construction has begun, public notice of the petition will be given, and, at least 30 days thereafter, the Commission will act upon the petition.

(c) If no construction has begun, unless the Commission issues an order to the contrary, the exemption will remain in effect through the thirtieth day after the Commission issues a public notice of receipt of the petition. New applications involving the site of the surrendered exemption may be filed on the next business day.

(d) Exemptions may be surrendered only upon fulfillment by the exemption holder of such obligations under the exemption as the Commission may prescribe and, if construction has begun, upon such conditions with respect to the disposition of such project works and restoration of project lands as may be determined by the Commission and the Federal and state fish and wildlife agencies.

[Order 413, 50 FR 11687, Mar. 25, 1985]

§4.96 Amendment of exemption.

(a) An exemption holder must construct and operate its project as described in the exemption application approved by the Commission or its delegate.

(b) If an exemption holder desires to change the design, location, method of construction or operation of its project, it must first notify the appropriate Federal and state fish and wildlife agencies and inform them in writing of the changes it intends to implement. If these agencies determine that the changes would not cause the project to violate the terms and conditions imposed by the agencies, and if the changes would not materially alter the design, location, method of construction or operation of the project, the exemption holder may implement the changes. If any of these agencies determines that the changes would cause the project to violate the terms and conditions imposed by the agencies, or if the changes would materially alter the design, location, method of construction or the operation of the project works, the exemption holder may not implement the changes without first acquiring authorization from the Commission to amend its exemption, or acquiring a license that authorizes the project, as changed.

(c) An application to amend an exemption may be filed only by the holder of the exemption. An application to amend an exemption will be governed by the Commission's regulations governing applications for exemption. The Commission will not accept applications in competition with an application to amend an exemption, unless the Director of the Office of Hydropower Licensing determines that it is in the public interest to do so.

[Order 413, 50 FR 11687, Mar. 25, 1985]

Subpart K—Exemption of Small Hydroelectric Power Projects of 5 Megawatts or Less

§ 4.101 Applicability.

This subpart provides procedures for exemption on a case-specific basis from all or part of Part I of the Federal Power Act (Act), including licensing, for small hydroelectric power projects as defined in § 4.30(b)(29).

(Energy Security Act of 1980, Pub. L. 96–294, 94 Stat. 611; Federal Power Act, as amended (16 U.S.C. 792–828c); Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601–2645); and the Department of Energy Organization Act (42 U.S.C. 7101–7352); E.O. 12009, 3 CFR 142 (1978))

[Order 202, 47 FR 4243, Jan. 29, 1982, as amended by Order 413, 50 FR 11687, Mar. 25, 1985; Order 482, 52 FR 39630, Oct. 23, 1987; Order 2002, 68 FR 51121, Aug. 25, 2003]

§ 4.102 Surrender of exemption.

(a) To voluntarily surrender its exemption, a holder of an exemption for a small hydroelectric power project must file a petition with the Commission.

(b)(1) If construction has begun, prior to filing a petition with the Commission, the exemption holder must consult with the fish and wildlife agencies in accordance with § 4.38, substituting for the information required under §4.38(b)(1) information appropriate to the disposition and restoration of the project works and lands. The petition must set forth the exemption holder's plans with respect to disposition and restoration of the project works and lands.

(2) If construction has begun, public notice of the petition will be given, and, at least 30 days thereafter, the Commission will act upon the petition. New applications involving the site may be filed on the next business day.

(c) If no construction had begun, unless the Commission issues an order to the contrary, the surrender will take effect at the close of the thirtieth day after the Commission issues a public notice of receipt of the petition. New applications involving the site may be filed on the next business day.

(d) Exemptions may be surrendered only upon fulfillment by the exemption holder of such obligations under the exemption as the Commission may prescribe and, if construction has begun, upon such conditions with respect to the disposition of such project works and restoration of project lands as may be determined by the Commission and the Federal and state fish and wildlife agencies.

(e) Where occupancy of United States lands or reservations has been permitted by a Federal agency having supervision over such lands, the exemption holder must concurrently notify that agency of the petition to surrender and of the steps that will be taken to restore the affected U.S. lands or reservations.

[Order 413, 50 FR 11688, Mar. 25, 1985]

§ 4.103 General provisions for case-specific exemption.

(a) *Exemptible projects.* Subject to the provisions in paragraph (b) of this section, § 4.31(c), and §§ 4.105 and 4.106, the Commission may exempt on a case-specific basis any small hydroelectric power project from all or part of Part I of the Act, including licensing requirements. Any applications for exemption for a project shall conform to the requirements of §§ 4.107 or 4.108, as applicable.

(b) *Limitation for licensed water power project.* The Commission will not accept for filing an application for exemption from licensing for any project that is only part of a licensed water power project.

(c) *Waiver.* In applying for case-specific exemption from licensing, a qualified exemption applicant may petition under § 385.207 of this chapter for waiver of any specific provision of §§ 4.102 through 4.107. The Commission will grant a waiver only if consistent with section 408 of the Energy Security Act of 1980.

[Order 413, 50 FR 11688, Mar. 25, 1985, as amended by Order 503, 53 FR 36568, Sept. 21, 1988]

§ 4.104 Amendment of exemption.

(a) An exemption holder must construct and operate its project as described in the exemption application approved by the Commission or its delegate.

(b) If an exemption holder desires to change the design, location, method of

construction or operation of its project, it must first notify the appropriate Federal and state fish and wildlife agencies and inform them in writing of the changes it intends to implement. If these agencies determine that the changes would not cause the project to violate the terms and conditions imposed by the agencies, and if the changes would not materially alter the design, location, method of construction or operation of the project, the exemption holder may implement the changes. If any of these agencies determines that the changes would cause the project to violate the terms and conditions imposed by that agency, or if the changes would materially alter the design, location, method of construction or the operation of the project works, the exemption holder may not implement the changes without first acquiring authorization from the Commission to amend its exemption or acquiring a license for the project works that authorizes the project, as changed.

(c) An application to amend an exemption may be filed only by the holder of an exemption. An application to amend an exemption will be governed by the Commission's regulations governing applications for exemption. The Commission will not accept applications in competition with an application to amend an exemption, unless the Director of the Office of Hydropower Licensing determines that it is in the public interest to do so.

[Order 413, 50 FR 11688, Mar. 25, 1985]

§4.105 Action on exemption applications.

(a) *Exemption from provisions other than licensing.* An application for exemption of a small hydroelectric power project from provisions of Part I of the Act other than the licensing requirement will be processed and considered as part of the related application for license or amendment of license.

(b)(1) *Consultation.* The Commission will circulate a notice of application for exemption from licensing to interested agencies and Indian tribes at the time the applicant is notified that the application is accepted for filing.

(2) *Non-standard terms and conditions.* In approving any application for exemption from licensing, the Commission may prescribe terms or conditions in addition to those set forth in §4.106 in order to:

(i) Protect the quality or quantity of the related water supply;

(ii) Otherwise protect life, health, or property;

(iii) Avoid or mitigate adverse environmental impact; or

(iv) Better conserve, develop, or utilize in the public interest the water resources of the region.

(Energy Security Act of 1980, Pub. L. 96–294, 94 Stat. 611; Federal Power Act, as amended (16 U.S.C. 792–828c); Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601–2645); and the Department of Energy Organization Act (42 U.S.C. 7101–7352); E.O. 12009, 3 CFR 142 (1978))

[Order 106, 45 FR 76123, Nov. 18, 1980, as amended by Order 202, 47 FR 4246, Jan. 29, 1982; Order 413, 50 FR 11688, Mar. 25, 1985; Order 533, 56 FR 23154, May 20, 1991]

§4.106 Standard terms and conditions of case-specific exemption from licensing.

Any case-specific exemption from licensing granted for a small hydroelectric power project is subject to the following standard terms and conditions:

(a) *Article 1.* The Commission reserves the right to conduct investigations under sections 4(g), 306, 307, and 311 of the Federal Power Act with respect to any acts, complaints, facts, conditions, practices, or other matters related to the construction, operation, or maintenance of the exempt project. If any term or condition of the exemption is violated, the Commission may revoke the exemption, issue a suitable order under section 4(g) of the Federal Power Act, or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.

(b) *Article 2.* The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that the United States Fish and Wildlife Service, the National Marine Fisheries Service, and any state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or otherwise to carry out the

purposes of the Fish and Wildlife Coordination Act, as specified in exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of exemption application.

(c) *Article 3.* The Commission may revoke this exemption if actual construction of any proposed generating facilities has not begun within two years or has not been completed within four years from the date on which this exemption was granted. If an exemption is revoked under this article, the Commission will not accept from the prior exemption holder a subsequent application for exemption from licensing for the same project within two years of the revocation.

(d) *Article 4.* This exemption is subject to the navigation servitude of the United States if the project is located on navigable waters of the United States.

(e) *Article 5.* This exemption does not confer any right to use or occupy any Federal lands that may be necessary for the development or operation of the project. Any right to use or occupy any Federal lands for those purposes must be obtained from the administering Federal land agencies. The Commission may accept a license application submitted by any qualified license applicant and revoke this exemption, if any necessary right to use or occupy Federal lands for those purposes has not been obtained within one year from the date on which this exemption was granted.

(f) *Article 6.* In order to best develop, conserve, and utilize in the public interest the water resources of the region, the Commission may require that the exempt facilities be modified in structure or operation or may revoke this exemption.

(g) *Article 7.* The Commission may revoke this exemption if, in the application process, material discrepancies, inaccuracies, or falsehoods were made by or on behalf of the applicant.

(h) *Article 8.* Any exempted small hydroelectric power project that utilizes a dam that is more than 33 feet in height above streambed, as defined in 18 CFR 12.31(c) of this chapter, impounds more than 2,000 acre-feet of water, or has a significant or high hazard potential, as defined in 33 CFR part 222, is subject to the following provisions of 18 CFR part 12, as it may be amended:

(1) Section 12.4(b)(1) (i) and (ii), (b)(2) (i) and (iii), (b)(iv), and (b)(v);

(2) Section 12.4(c);

(3) Section 12.5;

(4) Subpart C; and

(5) Subpart D.

For the purposes of applying these provisions of 18 CFR part 12, the exempted project is deemed to be a licensed project development and the owner of the exempted project is deemed to be a licensee.

(i) Before transferring any property interests in the exempt project, the exemption holder must inform the transferee of the terms and conditions of the exemption. Within 30 days of transferring the property interests, the exemption holder must inform the Commission of the identity and address of the transferee.

[Order 106, 45 FR 76123, Nov. 18, 1980; 45 FR 77420, Nov. 24, 1980, as amended by Order 202, 47 FR 4246, Jan. 29, 1982; Order 413, 50 FR 11688, Mar. 25, 1985; Order 482, 52 FR 39630, Oct. 23, 1987; Order 413–A, 56 FR 31331, July 10, 1991]

§ 4.107 Contents of application for exemption from licensing.

(a) *General requirements.* An application for exemption from licensing submitted under this subpart must contain the introductory statement, the exhibits described in this section, the fee prescribed in § 381.601 of this chapter and, if the project structures would use or occupy any lands other than Federal lands, an appendix containing documentary evidence showing that applicant has the real property interests required under § 4.31(c)(2)(ii). The applicant must identify in its application all Indian tribes that may be affected by the project.

(b) *Introductory statement.* The application must include an introductory statement that conforms to the following format:

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Exemption of Small Hydroelectric Power Project From Licensing

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for an exemption for [name of project], a small hydroelectric power project that is proposed to have an installed capacity of 5 megawatts or less, from licensing under the Federal Power Act. [If applicable: The project is currently licensed as FERC Project No. ——.]

(2) The location of the project is:
[State or territory] _____
[County] _____
[Township or nearby town] _____
[Stream or body of water] _____

(3) The exact name and business address of each applicant are:

(4) The exact name and business address of each person authorized to act as agent for the applicant in this application are:

(5) [Name of applicant] is [specify, as appropriate: a citizen of the United States or other identified nation; an association of citizens of the United States or other identified nation; a municipality; a state; or a corporation incorporated under the laws of (specify the United States or the state or nation of incorporation, as appropriate).]

(c) *Exhibit A.* Exhibit A must describe the small hydroelectric power project and its proposed mode of operation. To the extent feasible, the information in this exhibit may be submitted in tabular form. The applicant must submit the following information:

(1) A brief description of any existing dam and impoundment proposed to be utilized by the small hydroelectric power project and any other existing or proposed project works and appurtenant facilities, including intake facilities, diversion structures, powerhouses, primary transmission lines, penstocks, pipelines, spillways, and other structures, and the sizes, capacities, and construction materials of those structures.

(2) The number of existing and proposed generating units at the project, including auxiliary units, the capacity of each unit, any provisions for future units, and a brief description of any plans for retirement or rehabilitation of existing generating units.

(3) The type of each hydraulic turbine of the small hydroelectric power project.

(4) A description of how the power plant is to be operated, that is, run-of-river or peaking.

(5) A graph showing a flow duration curve for the project. Identify stream gauge(s) and period of record used. If a synthetic record is utilized, provide details concerning its derivation. Furnish justification for selection of installed capacity if the hydraulic capacity of proposed generating unit(s) plus the minimum flow requirements, if not usable for power production, is less than the stream flow that is exceeded 25 percent of the time.

(6) Estimations of:

(i) The average annual generation in kilowatt-hours;

(ii) The average and design head of the power plant;

(iii) The hydraulic capacity of each turbine of the power plant (flow through the plant) in cubic feet per second;

(iv) The number of surface acres of the man-made or natural impoundment used, if any, at its normal maximum surface elevation and its net and gross storage capacities in acre-feet.

(7) The planned date for beginning and completing the proposed construction or development of generating facilities.

(8) A description of the nature and extent of any repair, reconstruction, or other modification of a dam that would occur in association with construction or development of the proposed small hydroelectric power project, including a statement of the normal maximum surface area and normal maximum surface elevation of any existing impoundment before and after construction.

(d) *Exhibit G.* Exhibit G is a map of the project and boundary and must conform to the specifications of §4.41(h) of this chapter.

(e) *Exhibit E.* This exhibit is an environmental report that must include the following information, commensurate with the scope and environmental impact of the construction and operation of the small hydroelectric power

project. *See* § 4.38 for consultation requirements.

(1) A description of the environmental setting of the project, including vegetative cover, fish and wildlife resources, water quality and quantity, land and water uses, recreational uses, historical and archeological resources, and scenic and aesthetic resources. The report must list any endangered or threatened plant and animal species, any critical habitats, and any sites eligible for or included on the National Register of Historic Places. The applicant may obtain assistance in the preparation of this information from state natural resources agencies, the state historic preservation officer, and from local offices of Federal natural resources agencies.

(2) A description of the expected environmental impacts from the proposed construction or development and the proposed operation of the small hydroelectric power project, including any impacts from any proposed changes in the capacity and mode of operation of the project if it is already generating electric power, and an explanation of the specific measures proposed by the applicant, the agencies consulted, and others to protect and enhance environmental resources and values and to mitigate adverse impacts of the project on such resources.

(3) Any additional information the applicant considers important.

(f) *Exhibit F.* Exhibit F is a set of drawings showing the structures and equipment of the small hydroelectric facility and must conform to the specifications of § 4.41(g) of this chapter.

[Order 106, 45 FR 76123, Nov. 18, 1980, as amended by Order 225, 47 FR 19056, May 3, 1982; Order 413, 50 FR 11689, Mar. 25, 1985; Order 494, 53 FR 15381, Apr. 29, 1988; Order 533, 56 FR 23154, May 20, 1991; Order 2002, 68 FR 51121, Aug. 25, 2003]

§ 4.108 Contents of application for exemption from provisions other than licensing.

An application for exemption of a small hydroelectric power project from provisions of Part I of the Act other than the licensing requirement need not be prepared according to any specific format, but must be included as an identified appendix to the related application for license or amendment of license. The application for exemption must list all sections or subsections of Part I of the Act for which exemption is requested.

[Order 106, 45 FR 76123, Nov. 18, 1980]

Subpart L—Application for Amendment of License

§ 4.200 Applicability.

This part applies to any application for amendment of a license, if the applicant seeks to:

(a) Make a change in the physical features of the project or its boundary, or make an addition, betterment, abandonment, or conversion, of such character as to constitute an alteration of the license;

(b) Make a change in the plans for the project under license; or

(c) Extend the time fixed in the license for commencement or completion of project works.

[Order 184, 46 FR 55943, Nov. 13, 1981, as amended by Order 2002, 68 FR 51121, Aug. 25, 2003]

§ 4.201 Contents of application.

An application for amendment of a license for a water power project must contain the following information in the form specified.

(a) *Initial statement.*

BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Application for Amendment of License

(1) [Name of applicant] applies to the Federal Energy Regulatory Commission for an amendment of license for the [name of project] water power project.

(2) The exact name, business address, and telephone number of the applicant are:

_____

_____

_____

(3) The applicant is a [citizen of the United States, association of citizens of the United States, domestic corporation, municipality, or state, as appropriate, see 16 U.S.C. 796], licensee for the water power project, designated as Project No. _____ in the records of the Federal Energy Regulatory Commission, issued on the _____ day of _____, 19___.

(4) The amendments of license proposed and the reason(s) why the proposed changes

are necessary, are: [Give a statement or description]

(5)(i) The statutory or regulatory requirements of the state(s) in which the project would be located that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes are: [provide citation and brief identification of the nature of each requirement.]

(ii) The steps which the applicant has taken or plans to take to comply with each of the laws cited above are: [provide brief description for each law.]

(b) *Required exhibits for capacity related amendments.* Any application to amend a license for a hydropower project that involves additional capacity not previously authorized, and that would increase the actual or proposed total installed capacity of the project, would result in an increase in the maximum hydraulic capacity of the project of 15 percent or more, and would result in an increase in the installed nameplate capacity of 2 megawatts or more, must contain the following exhibits, or revisions or additions to any exhibits on file, commensurate with the scope of the licensed project:

(1) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.41 of this chapter;

(2) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 1.5 MW or less—Exhibits E, F, and G under § 4.61 of this chapter;

(3) For amendment of a license for a water power project that, at the time the application is filed, is not constructed and is proposed to have a total installed generating capacity of 5 MW or less, but more than 1.5 MW—Exhibits F and G under § 4.61 of this chapter, and Exhibit E under § 4.41 of this chapter;

(4) For amendment of a license for a water power project that, at the time the application for amendment is filed, has been constructed, and is proposed to have a total installed generating capacity of 5 MW or less—Exhibit E, F and G under § 4.61 of this chapter;

(5) For amendment of a license for a water power project that, at the time the application is filed, has been constructed and is proposed to have a total installed generating capacity of more than 5 MW—Exhibits A, B, C, D, E, F, and G under § 4.51 of this chapter.

(c) *Required exhibits for non-capacity related amendments.* Any application to amend a license for a water power project that would not be a capacity related amendment as described in paragraph (b) of this section must contain those exhibits that require revision in light of the nature of the proposed amendments.

(d) *Consultation and waiver.* (1) If an applicant for license under this subpart believes that any exhibit required under paragraph (b) of this section is inappropriate with respect to the particular amendment of license sought by the applicant, a petition for waiver of the requirement to submit such exhibit may be submitted to the Commission under § 385.207(c)(4) of this chapter, after consultation with the Commission's Division by Hydropower Licensing.

(2) A licensee wishing to file an application for amendment of license under this section may seek advice from the Commission staff regarding which exhibits(s) must be submitted and whether the proposed amendment is consistent with the scope of the existing licensed project.

[Order 184, 46 FR 55943, Nov. 13, 1981, as amended by Order 225, 47 FR 19056, May 3, 1982; 48 FR 4459, Feb. 1, 1983; 48 FR 16653, Apr. 19, 1983; Order 413, 50 FR 11689, Mar. 25, 1985; Order 533, 56 FR 23154, May 20, 1991]

§ 4.202 Alteration and extension of license.

(a) If it is determined that approval of the application for amendment of license would constitute a significant alteration of license pursuant to section 6 of the Act, 16 U.S.C. 799, public notice of such application shall be given at least 30 days prior to action upon the application.

(b) Any application for extension of time fixed in the license for commencement or completion of construction of project works must be filed with the Commission not less than three

months prior to the date or dates so fixed.

[Order 184, 46 FR 55943, Nov. 13, 1981]

Subpart M—Fees Under Section 30(e) of the Act

SOURCE: Order 487, 52 FR 48404, Dec. 22, 1987, unless otherwise noted.

§ 4.300 Purpose, definitions, and applicability.

(a) *Purpose.* This subpart implements the amendments of section 30 of the Federal Power Act enacted by section 7(c) of the Electric Consumers Protection Act of 1986 (ECPA). It establishes procedures for reimbursing fish and wildlife agencies for costs incurred in connection with applications for an exemption from licensing and applications for licenses seeking benefits under section 210 of the Public Utility Regulatory Policies Act of 1978, as amended, for a project that would impound or divert the water of a natural watercourse by means of a new dam or diversion.

(b) *Definitions.* For the purposes of this subpart—

(1) *Cost* means an expenditure made by a fish and wildlife agency:

(i) On or after the effective date of this regulation for an application filed on or after the effective date of this regulation; and

(ii) Directly related to setting mandatory terms and conditions for a proposed project pursuant to section 30(c) of the Federal Power Act.

(2) *Cost statement* means a statement of the total costs for which a fish and wildlife agency requests reimbursement including an itemized schedule of costs including, but not limited to, costs of fieldwork and testing, contract costs, travel costs, personnel costs, and administrative and overhead costs.

(3) *Mandatory terms and conditions* means terms and conditions of a license or exemption that a fish and wildlife agency determines are appropriate to prevent loss of, or damage to, fish and wildlife resources pursuant to section 30(c) of the Federal Power Act.

(4) *New dam or diversion license applicant* means an applicant for a license for a project that would impound or divert the water of a natural watercourse by means of a new dam or diversion, as defined in section 210(k) of the Public Utility Regulatory Policies Act of 1978, as amended.

(5) *PURPA benefits* means benefits under section 210 of the Public Utility Regulatory Policies Act of 1978, as amended.

(6) *Section 30(c) application* means an application for an exemption from licensing or a new dam or diversion license application seeking PURPA benefits.

(c) *Applicability.* Except as provided in paragraph (d) of this section, this subpart applies to:

(1) Any application for exemption filed on or after the effective date of these regulations for costs incurred by fish and wildlife agencies after the effective date of these regulations;

(2) Any new dam or diversion license application seeking PURPA benefits filed on or after April 16, 1988;

(3) Any new dam or diversion license application seeking PURPA benefits filed after the effective date of this regulation, but before April 16, 1988, if the applicant fails to demonstrate in a monetary resources petition filed with the Commission pursuant to § 292.208 of this chapter that, before October 16, 1986, it had committed substantial monetary resources directly related to the development of the proposed project and to the diligent and timely completion of all requirements of the Commission for filing an acceptable application; and

(4) Any new dam or diversion license application seeking PURPA benefits filed after the effective date of this regulation, if the application is not accepted for filing before October 16, 1989.

(d) *Exceptions.* (1) This subpart does not apply to any new dam or diversion license application seeking PURPA benefits if the moratorium described in section 8(e) of ECPA is in effect. The moratorium will end at the expiration of the first full session of Congress following the session during which the Commission reports to Congress on the results of the study required under section 8(d) of ECPA.

(2) This subpart does not apply to any new dam or diversion license application seeking PURPA benefits for a

project located at a Government dam, as defined in section 3(10) of the Federal Power Act, at which non-Federal hydroelectric development is permissible.

§ 4.301 Notice to fish and wildlife agencies and estimation of fees prior to filing.

(a) *Notice to agencies*—(1) *New dam or diversion license applicants.* During the initial stage or pre-filing agency consultation under § 4.38(b)(1), a prospective new dam or diversion license applicant must inform each fish and wildlife agency consulted in writing with a copy to the Commission whether it will seek PURPA benefits.

(2) *Exemption applicants.* During the initial stage of pre-filing agency consultation under § 4.38(b)(1), a prospective exemption applicant must notify each fish and wildlife agency consulted that it will seek an exemption from licensing.

(b) *Estimate of fees.* Within the comment period provided in § 4.38(b)(2)(iv), a fish and wildlife agency must provide a prospective section 30(c) applicant with a reasonable estimate of the total costs the agency anticipates it will incur to set mandatory terms and conditions for the proposed project. An agency may provide an applicant with an updated estimate as it deems necessary. If an agency believes that its most recent estimate will be exceeded by more than 25 percent, it must supply the prospective applicant or applicant with a new estimate and submit a copy to the Commission.

§ 4.302 Fees at filing.

(a) *Filing requirement.* A section 30(c) application must be accompanied by a fee or a bond, together with copies of the most recent cost estimates provided by fish and wildlife agencies pursuant to § 4.301(b).

(b) *Amount.* The fee required under paragraph (a) of this section must be in an amount equal to 50 percent of the most recent cost estimates provided by fish and wildlife agencies pursuant to § 4.301(b). In lieu of this amount, an applicant may provide an unlimited term surety bond from a company on the Department of Treasury's list of companies certified to write surety bonds. Applicants bonded by a company whose certification by the Department of the Treasury lapses must provide evidence of purchase of another bond from a certified company. A bond must be for an amount no less than 100 percent of the agencies' most recent cost estimates pursuant to § 4.301(b).

(c) *Failure to file.* The Commission will reject a section 30(c) application if the applicant fails to comply with the provisions of paragraphs (a) and (b) of this section.

§ 4.303 Post-filing procedures.

(a) *Submission of cost statement*—1) *Accepted applications.* Within 60 days after the last date for filing mandatory terms and conditions pursuant to § 4.32(c)(4) for a new dam or diversion license application seeking PURPA benefits, § 4.93(b) for an application for exemption of a small conduit hydroelectric facility, or § 4.105(b)(1) for an application for case-specific exemption of a small hydroelectric power project, a fish and wildlife agency must file with the Commission a cost statement of the reasonable costs the agency incurred in setting mandatory terms and conditions for the proposed project. An agency may request, in writing, along with any supporting documentation an extension of this 60-day period.

(2) *Rejected, withdrawn or dismissed applications.* The Director of the Office of Energy Projects (Director) will, by letter, notify each fish and wildlife agency if a section 30(c) application is rejected, withdrawn or dismissed. Within 60 days from the date of notification, a fish and wildlife agency must file with the Commission a cost statement of the reasonable costs the agency incurred prior to the date the application was rejected, withdrawn, or dismissed. An agency may submit a written request for an extension of this 60-day period along with any supporting documentation.

(b) If an agency has not submitted a cost statement or extension request within the time provided in paragraph (a)(2) of this section, it waives its right to receive fees for that project pursuant to this subpart.

(c) *Billing.* After the Commission receives a cost statement from all fish and wildlife agencies as required by

paragraph (a) of this section, the Commission will bill the section 30(c) applicant. The bill will show:

(1) The cost statement submitted to the Commission by each fish and wildlife agency;

(2) Any amounts already paid by the applicant pursuant to § 4.302; and

(3)(i) The amount due, if the amount already paid by the applicant pursuant to § 4.302 is less than the total of all the cost statements; or

(ii) The amount to be refunded to the applicant, if the amount already paid by the applicant pursuant to § 4.302 is more than the total of all the cost statements.

(d) Within 45 days from the date of a bill issued under paragraph (b) of this section, a section 30(c) applicant must pay in full to the Commission any remaining amounts due on the cost statements regardless of whether any of these amounts are in dispute.

(e) *Dispute procedures*—(1) *When to dispute.* Any dispute regarding the reasonableness of any fish and wildlife agency cost statement must be made within 45 days from the date of a bill issued under paragraph (b) of this section.

(2) *Assessment of disputed cost statements* The burden of showing that an agency's cost statement is unreasonable is on the applicant. However, a fish and wildlife agency must supply the disputing applicant and the Commission with the documentation necessary to support its cost statement. The Director of the Office of Energy Projects will determine the reasonableness of a disputed fish and wildlife agency cost statement. The Director's decision will be in writing. The Director will notify the disputing applicant and the fish and wildlife agency of the decision by letter. Any decision of the Director may be appealed by either party pursuant to 18 CFR 385.1902. In deciding whether or not a disputed cost statement is reasonable, the Director will review the application, the disputed cost statement and any other documentation relating to the particular environmental problems associated with the disputing applicant's proposed project. The Director will consider such factors as:

(i) The time the fish and wildlife agency spent reviewing the application;

(ii) The proportion of the cost statement to the time the fish and wildlife agency spent reviewing the application;

(iii) Whether the fish and wildlife agency's expenditures conform to Federal expenditure guidelines for such items as travel, per diem, personnel, and contracting; and

(iv) Whether the studies conducted by the agency, if any, are duplicative, limited to the proposed project area, unnecessary to determine the impacts to or mitigation measures for the particular fish and wildlife resources affected by the proposed project, or otherwise unnecessary to set terms and conditions for the proposed project.

(3) *Unreasonable cost statements.* If the Director determines that a disputed fish and wildlife agency cost statement is unreasonable, the disputing applicant and the fish and wildlife agency will be afforded 45 days from the date of notification to attempt to reach an agreement regarding the reimbursable costs of the agency. If the disputing applicant and the fish and wildlife agency fail to reach an agreement on the disputed cost statement within 45 days from the date of notification, the Director will determine the costs that the agency should reasonably have incurred.

(f) *Refunds.* (1) If the amount paid by a section 30(c) applicant under § 4.302 exceeds the total amount of the cost statements submitted by fish and wildlife agencies under paragraph (a) of this section, the Commission will notify the Treasury to refund the difference to the applicant within 45 days from the date of the bill issued to the applicant under paragraph (b) of this section.

(2) If the amount paid by a section 30(c) applicant exceeds the amount determined to be reasonable by the Director pursuant to paragraph (d)(2) of this section, the Commission will notify the Treasury to refund the difference to the applicant within 45 days of the resolution of all dispute proceedings.

[Order 487, 52 FR 48404, Dec. 22, 1987, as amended by Order 647, 69 FR 32438, June 10, 2004]

§ 4.304 Payment.

(a) A payment required under this subpart must be made by check payable to the United States Treasury. The check must indicate that the payment is for *ECPA Fees*.

(b) If a payment required under this subpart is not made within the time period prescribed for making such payment, interest and penalty charges will be assessed. Interest and penalty charges will be computed in accordance with 31 U.S.C. 3717 and 4 CFR part 102.

(c) The Commission will not issue a license or exemption, unless the applicant has made full payments of any fees due under § 4.303(c).

§ 4.305 Enforcement.

(a) The Commission may take any appropriate action permitted by law if a section 30(c) applicant does not make a payment required under this subpart. The Commission will not be liable to any fish and wildlife agency for failure to collect any amounts under this subpart.

(b) If the Commission is unable to collect the full amount due by a section 30(c) applicant on behalf of more than one agency, the amount the Commission does collect will be distributed to the agencies on a *pro-rata* basis except if an agency's cost statement is greater than its most recent estimate to the applicant under § 4.301(b), then the difference between the estimate and the cost statement will not be reimbursed until any amounts owed to other agencies have been paid.

PART 5—INTEGRATED LICENSE APPLICATION PROCESS

Sec.

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 42 U.S.C. 7101–7352.

SOURCE: Order 2002, 68 FR 51121, Aug. 25, 2003, unless otherwise noted.

§ 5.1 Applicability, definitions, and requirement to consult.

(a) This part applies to the filing and processing of an application for an:

(1) Original license;

(2) New license for an existing project subject to Sections 14 and 15 of the Federal Power Act; or

(3) Subsequent license.

(b) *Definitions.* The definitions in § 4.30(b) of this chapter and § 16.2 of this chapter apply to this chapter.

(c) *Who may file.* Any citizen, association of citizens, domestic corporation, municipality, or state may develop and file a license application under this part.

(d) *Requirement to consult.* (1) Before it files any application for an original, new, or subsequent license under this part, a potential applicant must consult with the relevant Federal, state, and interstate resource agencies, including as appropriate the National Marine Fisheries Service, the United States Fish and Wildlife Service, Bureau of Indian Affairs, the National

Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate state water resource management agencies, the certifying agency or Indian tribe under Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341(c)(1)), the agency that administers the Coastal Zone Management Act, 16 U.S.C. §1451–1465, any Indian tribe that may be affected by the project, and members of the public. A potential license applicant must file a notification of intent to file a license application pursuant to §5.5 and a pre-application document pursuant to the provisions of §5.6.

(2) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(e) *Purpose.* The purpose of the integrated licensing process provided for in this part is to provide an efficient and timely licensing process that continues to ensure appropriate resource protections through better coordination of the Commission's processes with those of Federal and state agencies and Indian tribes that have authority to condition Commission licenses.

(f) *Default process.* Each potential original, new, or subsequent license applicant must use the license application process provided for in this part unless the potential applicant applies for and receives authorization from the Commission under this part to use the licensing process provided for in:

(1) 18 CFR part 4, Subparts D–H and, as applicable, part 16 (*i.e.,* traditional process), pursuant to paragraph (c) of this section; or

(2) Section 4.34(i) of this chapter, *Alternative procedures.*

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003; 68 FR 69957, Dec. 16, 2003]

§5.2 Document availability.

(a) *Pre-application document.* (1) From the date a potential license applicant files a notification of intent to seek a license pursuant to §5.5 until any related license application proceeding is terminated by the Commission, the potential license applicant must make reasonably available to the public for inspection at its principal place of business or another location that is more accessible to the public, the pre-application document and any materials referenced therein. These materials must be available for inspection during regular business hours in a form that is readily accessible, reviewable, and reproducible.

(2) The materials specified in paragraph (a)(1) of this section must be made available to the requester at the location specified in paragraph (a)(1) of this section or through the mail, or otherwise. Except as provided in paragraph (a)(3) of this section, copies of the pre-application document and any materials referenced therein must be made available at their reasonable cost of reproduction plus, if applicable, postage.

(3) A potential licensee must make requested copies of the materials specified in paragraph (a)(1) of this section available to the United States Fish and Wildlife Service, the National Marine Fisheries Service, the state agency responsible for fish and wildlife resources, any affected Federal land managing agencies, and Indian tribes without charge for the costs of reproduction or postage.

(b) *License application.* (1) From the date on which a license application is filed under this part until the licensing proceeding for the project is terminated by the Commission, the license applicant must make reasonably available to the public for inspection at its principal place of business or another location that is more accessible to the public, a copy of the complete application for license, together with all exhibits, appendices, and any amendments, pleadings, supplementary or additional information, or correspondence filed by the applicant with the Commission in connection with the application. These materials must be available for inspection during regular business hours in a form that is readily

accessible, reviewable, and reproducible at the same time as the information is filed with the Commission or required by regulation to be made available.

(2) The applicant must provide a copy of the complete application (as amended) to a public library or other convenient public office located in each county in which the proposed project is located.

(3) The materials specified in paragraph (b)(1) of this section must be made available to the requester at the location specified in paragraph (b)(1) of this section or through the mail. Except as provided in paragraph (b)(4) of this section, copies of the license application and any materials referenced therein must be made available at their reasonable cost of reproduction plus, if applicable, postage.

(4) A licensee applicant must make requested copies of the materials specified in paragraph (b)(1) of this section available to the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the state agency responsible for fish and wildlife resources, any affected Federal land managing agencies, and Indian tribes without charge for the costs of reproduction or postage.

(c) *Confidentiality of cultural information.* A potential applicant must delete from any information made available to the public under paragraphs (a) and (b) of this section, specific site or property locations the disclosure of which would create a risk of harm, theft, or destruction of archeological or native American cultural resources or of the site at which the sources are located, or would violate any Federal law, include the Archeological Resources Protection Act of 1979, 16 U.S.C. 470w–3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh.

(d) *Access.* Anyone may file a petition with the Commission requesting access to the information specified in paragraphs (a) or (b) of this section if it believes that the potential applicant or applicant is not making the information reasonably available for public inspection or reproduction. The petition must describe in detail the basis for the petitioner's belief.

§ 5.3 Process selection.

(a)(1) Notwithstanding any other provision of this part or of parts 4 and 16 of this chapter, a potential applicant for a new, subsequent, or original license may until July 23, 2005 elect to use the licensing procedures of this part or the licensing procedures of parts 4 and 16.

(2) Any potential license applicant that files its notification of intent pursuant to § 5.5 and pre-application document pursuant to § 5.6 after July 23, 2005 must request authorization to use the licensing procedures of parts 4 and 16, as provided for in paragraphs (b)–(f) of this section.

(b) A potential license applicant may file with the Commission a request to use the traditional licensing process or alternative procedures pursuant to this Section with its notification of intent pursuant to § 5.5.

(c)(1)(i) An application for authorization to use the traditional process must include justification for the request and any existing written comments on the potential applicant's proposal and a response thereto.

(ii) A potential applicant requesting authorization to use the traditional process should address the following considerations:

(A) Likelihood of timely license issuance;

(B) Complexity of the resource issues;

(C) Level of anticipated controversy;

(D) Relative cost of the traditional process compared to the integrated process;

(E) The amount of available information and potential for significant disputes over studies; and

(F) Other factors believed by the applicant to be pertinent

(2) A potential applicant requesting the use of § 4.34(i) *alternative procedures* of this chapter must:

(i) Demonstrate that a reasonable effort has been made to contact all agencies, Indian tribes, and others affected by the applicant's request, and that a consensus exists that the use of alternative procedures is appropriate under the circumstances;

(ii) Submit a communications protocol, supported by interested entities, governing how the applicant and other

participants in the pre-filing consultation process, including the Commission staff, may communicate with each other regarding the merits of the potential applicant's proposal and proposals and recommendations of interested entities; and

(iii) Provide a copy of the request to all affected resource agencies and Indian tribes and to all entities contacted by the applicant that have expressed an interest in the alternative pre-filing consultation process.

(d)(1) The potential applicant must provide a copy of the request to use the traditional process or alternative procedures to all affected resource agencies, Indian tribes, and members of the public likely to be interested in the proceeding. The request must state that comments on the request to use the traditional process or alternative procedures, as applicable, must be filed with the Commission within 30 days of the filing date of the request and, if there is no project number, that responses must reference the potential applicant's name and address.

(2) The potential applicant must also publish notice of the filing of its notification of intent, of the pre-application document, and of any request to use the traditional process or alternative procedures no later than the filing date of the notification of intent in a daily or weekly newspaper of general circulation in each county in which the project is located. The notice must:

(i) Disclose the filing date of the request to use the traditional process or alternative procedures, and the notification of intent and pre-application document;

(ii) Briefly summarize these documents and the basis for the request to use the traditional process or alternative procedures;

(iii) Include the potential applicant's name and address, and telephone number, the type of facility proposed to be applied for, its proposed location, the places where the pre-application document is available for inspection and reproduction;

(iv) Include a statement that comments on the request to use the traditional process or alternative procedures are due to the Commission and the potential applicant no later than 30 days following the filing date of that document and, if there is no project number, that responses must reference the potential applicant's name and address;

(v) State that comments on any request to use the traditional process should address, as appropriate to the circumstances of the request, the:

(A) Likelihood of timely license issuance;

(B) Complexity of the resource issues;

(C) Level of anticipated controversy;

(D) Relative cost of the traditional process compared to the integrated process; and

(E) The amount of available information and potential for significant disputes over studies; and

(F) Other factors believed by the commenter to be pertinent; and

(vi) State that respondents must submit an electronic filing pursuant to §385.2003(c) or an original and eight copies of their comments to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

(e) Requests to use the traditional process or alternative procedures shall be granted for good cause shown.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003]

§ 5.4 Acceleration of a license expiration date.

(a) *Request for acceleration.* (1) No later than five and one-half years prior to expiration of an existing license, a licensee may file with the Commission, in accordance with the formal filing requirements in subpart T of part 385 of this chapter, a written request for acceleration of the expiration date of its existing license, containing the statements and information specified in §16.6(b) of this chapter and a detailed explanation of the basis for the acceleration request.

(2) If the Commission grants the request for acceleration pursuant to paragraph (c) of this section, the Commission will deem the request for acceleration to be a notice of intent under §16.6 of this chapter and, unless the Commission directs otherwise, the licensee must make available the Pre-Application Document provided for in §5.6 no later than 90 days from the date

that the Commission grants the request for acceleration.

(b) *Notice of request for acceleration.* (1) Upon receipt of a request for acceleration, the Commission will give notice of the licensee's request and provide a 45-day period for comments by interested persons by:

(i) Publishing notice in the FEDERAL REGISTER;

(ii) Publishing notice once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies and Indian tribes, and non-governmental organizations likely to be interested, by electronic means if practical, otherwise by mail.

(2) The notice issued pursuant to paragraphs (b)(1)(A) and (B) and the written notice given pursuant to paragraph (b)(1)(C) will be considered as fulfilling the notice provisions of §16.6(d) of this chapter should the Commission grant the acceleration request and will include an explanation of the basis for the licensee's acceleration request.

(c) *Commission order.* If the Commission determines it is in the public interest, the Commission will issue an order accelerating the expiration date of the license to not less than five years and 90 days from the date of the Commission order.

[Order 2002, 68 FR 51121, Aug. 25, 2003, as amended by Order 653, 70 FR 8724, Feb. 23, 2005]

§ 5.5 Notification of intent.

(a) *Notification of intent.* A potential applicant for an original, new, or subsequent license, must file a notification of its intent to do so in the manner provided for in paragraphs (b) and (c) of this section.

(b) *Requirement to notify.* In order for a non-licensee to notify the Commission that it intends to file an application for an original, new, or subsequent license, or for an existing licensee to notify the Commission whether or not it intends to file an application for a new or subsequent license, a potential license applicant must file with the Commission pursuant to the requirements of subpart T of part 385 of this chapter an original and eight copies of a letter that contains the following information:

(1) The potential applicant or existing licensee's name and address.

(2) The project number, if any.

(3) The license expiration date, if any.

(4) An unequivocal statement of the potential applicant's intention to file an application for an original license, or, in the case of an existing licensee, to file or not to file an application for a new or subsequent license.

(5) The type of principal project works licensed, if any, such as dam and reservoir, powerhouse, or transmission lines.

(6) The location of the project by state, county, and stream, and, when appropriate, by city or nearby city.

(7) The installed plant capacity, if any.

(8) The names and mailing addresses of:

(i) Every county in which any part of the project is located, and in which any Federal facility that is used or to be used by the project is located;

(ii) Every city, town, or similar political subdivision;

(A) In which any part of the project is or is to be located and any Federal facility that is or is to be used by the project is located, or

(B) That has a population of 5,000 or more people and is located within 15 miles of the existing or proposed project dam;

(iii) Every irrigation district, drainage district, or similar special purpose political subdivision:

(A) In which any part of the project is or is proposed to be located and any Federal facility that is or is proposed to be used by the project is located; or

(B) That owns, operates, maintains, or uses any project facility or any Federal facility that is or is proposed to be used by the project;

(iv) Every other political subdivision in the general area of the project or proposed project that there is reason to believe would be likely to be interested in, or affected by, the notification; and

(v) Affected Indian tribes.

(c) *Requirement to distribute.* Before it files any application for an original, new, or subsequent license, a potential

license applicant proposing to file a license application pursuant to this part or to request to file a license application pursuant to part 4 of this chapter and, as appropriate, part 16 of this chapter (*i.e.*, the ''traditional process''), including an application pursuant to §4.34(i) *alternative procedures* of this chapter must distribute to appropriate Federal, state, and interstate resource agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding the notification of intent provided for in paragraph (a) of this section.

(d) *When to notify.* An existing licensee or non-licensee potential applicant must notify the Commission as required in paragraph (b) of this section at least five years, but not more than five and one-half years, before the existing license expires.

(e) *Non-Federal representatives.* A potential license applicant may at the same time it files its notification of intent and distributes its pre-application document, request to be designated as the Commission's non-Federal representative for purposes of consultation under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402, Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and the implementing regulations at 50 CFR 600.920. A potential license applicant may at the same time request authorization to initiate consultation under section 106 of the National Historic Preservation Act and the implementing regulations at 36 CFR 800.2(c)(4).

(f) *Procedural matters.* The provisions of subpart F of part 16 of this chapter apply to projects to which this part applies.

(g) *Construction of regulations.* The provisions of this part and parts 4 and 16 shall be construed in a manner that best implements the purposes of each part and gives full effect to applicable provisions of the Federal Power Act.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 69957, Dec. 16, 2003]

§ 5.6 Pre-application document.

(a) *Pre-application document.* (1) Simultaneously with the filing of its notification of intent to seek a license as provided for in §5.5, and before it files any application for an original, new, or subsequent license, a potential applicant for a license to be filed pursuant to this part or part 4 of this chapter and, as appropriate, part 16 of this chapter, must file with the Commission an original and eight copies and distribute to the appropriate Federal, state, and interstate resource agencies, Indian tribes, local governments, and members of the public likely to be interested in the proceeding, the pre-application document provided for in this section.

(2) The agencies referred to in paragraph (a)(1) of this section include: Any state agency with responsibility for fish, wildlife, and botanical resources, water quality, coastal zone management plan consistency certification, shoreline management, and water resources; the U.S. Fish and Wildlife Service; the National Marine Fisheries Service; Environmental Protection Agency; State Historic Preservation Officer; Tribal Historic Preservation Officer; National Park Service; local, state, and regional recreation agencies and planning commissions; local and state zoning agencies; and any other state or Federal agency or Indian tribe with managerial authority over any part of project lands and waters.

(b) *Purpose of pre-application document.* (1) The pre-application document provides the Commission and the entities identified in paragraph (a) of this section with existing information relevant to the project proposal that is in the potential applicant's possession or that the potential applicant can obtain with the exercise of due diligence. This existing, relevant, and reasonably available information is distributed to these entities to enable them to identify issues and related information needs, develop study requests and study plans, and prepare documents analyzing any license application that may be filed. It is also a precursor to the environmental analysis section of the Preliminary Licensing Proposal or draft license application provided for in §5.16, Exhibit E of the final license application, and the Commission's

scoping document(s) and environmental impact statement or environmental assessment under the National Environmental Policy Act (NEPA).

(2) A potential applicant is not required to conduct studies in order to generate information for inclusion in the pre-application document. Rather, a potential applicant must exercise due diligence in determining what information exists that is relevant to describing the existing environment and potential impacts of the project proposal (including cumulative impacts), obtaining that information if the potential applicant does not already possess it, and describing or summarizing it as provided for in paragraph (d) of this section. Due diligence includes, but is not limited to, contacting appropriate agencies and Indian tribes that may have relevant information and review of Federal and state comprehensive plans filed with the Commission and listed on the Commission's Web site at *http://www.ferc.gov*.

(c) *Form and distribution protocol*—(1) *General requirements*. As specifically provided for in the content requirements of paragraph (d) of this section, the pre-application document must describe the existing and proposed (if any) project facilities and operations, provide information on the existing environment, and existing data or studies relevant to the existing environment, and any known and potential impacts of the proposed project on the specified resources.

(2) *Availability of source information and studies*. The sources of information on the existing environment and known or potential resource impacts included in the descriptions and summaries must be referenced in the relevant section of the document, and in an appendix to the document. The information must be provided upon request to recipients of the pre-application document. A potential applicant must provide the requested information within 20 days from receipt of the request. Potential applicants and requesters are strongly encouraged to use electronic means or compacts disks to distribute studies and other forms of information, but a potential applicant must, upon request, provide the information in hard copy form. The potential applicant is also strongly encouraged to include with the pre-application document any written protocol for distribution consistent with this paragraph to which it has agreed with agencies, Indian tribes, or other entities.

(d) *Content requirements*—(1) *Process plan and schedule*. The pre-application document must include a plan and schedule for all pre-application activity that incorporates the time frames for pre-filing consultation, information gathering, and studies set forth in this part. The plan and schedule must include a proposed location and date for the scoping meeting and site visit required by §5.8(b)(3)(viii).

(2) *Project location, facilities, and operations*. The potential applicant must include in the pre-application document:

(i) The exact name and business address, and telephone number of each person authorized to act as agent for the applicant;

(ii) Detailed maps showing lands and waters within the project boundary by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of any Federal and tribal lands, and the location of proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(iii) A detailed description of all existing and proposed project facilities and components, including:

(A) The physical composition, dimensions, and general configuration of any dams, spillways, penstocks, canals, powerhouses, tailraces, and other structures proposed to be included as part of the project or connected directly to it;

(B) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments;

(C) The number, type, and minimum and maximum hydraulic capacity and installed (rated) capacity of any proposed turbines or generators to be included as part of the project;

(D) The number, length, voltage, and interconnections of any primary transmission lines proposed to be included as part of the project, including a single-line diagram showing the transfer

of electricity from the project to the transmission grid or point of use; and

(E) An estimate of the dependable capacity, average annual, and average monthly energy production in kilowatt hours (or mechanical equivalent);

(iv) A description of the current (if applicable) and proposed operation of the project, including any daily or seasonal ramping rates, flushing flows, reservoir operations, and flood control operations.

(v) In the case of an existing licensed project;

(A) A complete description of the current license requirements; *i.e.,* the requirements of the original license as amended during the license term;

(B) A summary of project generation and outflow records for the five years preceding filing of the pre-application document;

(C) Current net investment; and

(D) A summary of the compliance history of the project, if applicable, including a description of any recurring situations of non-compliance.

(vi) A description of any new facilities or components to be constructed, plans for future development or rehabilitation of the project, and changes in project operation.

(3) *Description of existing environment and resource impacts*—(i) *General requirements.* A potential applicant must, based on the existing, relevant, and reasonably available information, include a discussion with respect to each resource that includes:

(A) A description of the existing environment as required by paragraphs (d)(3)(ii)–(xiii) of this section;

(B) Summaries (with references to sources of information or studies) of existing data or studies regarding the resource;

(C) A description of any known or potential adverse impacts and issues associated with the construction, operation or maintenance of the proposed project, including continuing and cumulative impacts; and

(D) A description of any existing or proposed project facilities or operations, and management activities undertaken for the purpose of protecting, mitigating impacts to, or enhancing resources affected by the project, including a statement of whether such measures are required by the project license, or were undertaken for other reasons. The type and amount of the information included in the discussion must be commensurate with the scope and level of resource impacts caused or potentially caused by the proposed project. Potential license applicants are encouraged to provide photographs or other visual aids, as appropriate, to supplement text, charts, and graphs included in the discussion.

(ii) *Geology and soils.* Descriptions and maps showing the existing geology, topography, and soils of the proposed project and surrounding area. Components of the description must include:

(A) A description of geological features, including bedrock lithology, stratigraphy, structural features, glacial features, unconsolidated deposits, and mineral resources at the project site;

(B) A description of the soils, including the types, occurrence, physical and chemical characteristics, erodability and potential for mass soil movement;

(C) A description of reservoir shorelines and streambanks, including:

(*1*) Steepness, composition (bedrock and unconsolidated deposits), and vegetative cover; and

(*2*) Existing erosion, mass soil movement, slumping, or other forms of instability, including identification of project facilities or operations that are known to or may cause these conditions.

(iii) *Water resources.* A description of the water resources of the proposed project and surrounding area. This must address the quantity and quality (chemical/physical parameters) of all waters affected by the project, including but not limited to the project reservoir(s) and tributaries thereto, bypassed reach, and tailrace. Components of the description must include:

(A) Drainage area;

(B) The monthly minimum, mean, and maximum recorded flows in cubic feet per second of the stream or other body of water at the powerplant intake or point of diversion, specifying any adjustments made for evaporation, leakage, minimum flow releases, or other reductions in available flow;

(C) A monthly flow duration curve indicating the period of record and the

location of gauging station(s), including identification number(s), used in deriving the curve; and a specification of the critical streamflow used to determine the project's dependable capacity;

(D) Existing and proposed uses of project waters for irrigation, domestic water supply, industrial and other purposes, including any upstream or downstream requirements or constraints to accommodate those purposes;

(E) Existing instream flow uses of streams in the project area that would be affected by project construction and operation; information on existing water rights and water rights applications potentially affecting or affected by the project;

(F) Any federally-approved water quality standards applicable to project waters;

(G) Seasonal variation of existing water quality data for any stream, lake, or reservoir that would be affected by the proposed project, including information on:

(*1*) Water temperature and dissolved oxygen, including seasonal vertical profiles in the reservoir;

(*2*) Other physical and chemical parameters to include, as appropriate for the project; total dissolved gas, pH, total hardness, specific conductance, cholorphyll a, suspended sediment concentrations, total nitrogen (mg/L as N), total phosphorus (mg/L as P), and fecal coliform (E. Coli) concentrations;

(H) The following data with respect to any existing or proposed lake or reservoir associated with the proposed project; surface area, volume, maximum depth, mean depth, flushing rate, shoreline length, substrate composition; and

(I) Gradient for downstream reaches directly affected by the proposed project.

(iv) *Fish and aquatic resources.* A description of the fish and other aquatic resources, including invasive species, in the project vicinity. This section must discuss the existing fish and macroinvertebrate communities, including the presence or absence of anadromous, catadromous, or migratory fish, and any known or potential upstream or downstream impacts of the project on the aquatic community. Components of the description must include:

(A) Identification of existing fish and aquatic communities;

(B) Identification of any essential fish habitat as defined under the Magnuson-Stevens Fishery Conservation and Management Act and established by the National Marine Fisheries Service; and

(C) Temporal and spacial distribution of fish and aquatic communities and any associated trends with respect to:

(*1*) Species and life stage composition;

(*2*) Standing crop;

(*3*) Age and growth data;

(*4*) Spawning run timing; and

(*5*) The extent and location of spawning, rearing, feeding, and wintering habitat.

(v) *Wildlife and botanical resources.* A description of the wildlife and botanical resources, including invasive species, in the project vicinity. Components of this description must include:

(A) Upland habitat(s) in the project vicinity, including the project's transmission line corridor or right-of-way and a listing of plant and animal species that use the habitat(s); and

(B) Temporal or spacial distribution of species considered important because of their commercial, recreational, or cultural value.

(vi) *Wetlands, riparian, and littoral habitat.* A description of the floodplain, wetlands, riparian habitats, and littoral in the project vicinity. Components of this description must include:

(A) A list of plant and animal species, including invasive species, that use the wetland, littoral, and riparian habitat;

(B) A map delineating the wetlands, riparian, and littoral habitat; and

(C) Estimates of acreage for each type of wetland, riparian, or littoral habitat, including variability in such availability as a function of storage at a project that is not operated in run-of-river mode.

(vii) *Rare, threatened and endangered species.* A description of any listed rare, threatened and endangered, candidate, or special status species that may be present in the project vicinity. Components of this description must include:

(A) A list of Federal- and state-listed, or proposed to be listed, threatened and

endangered species known to be present in the project vicinity;

(B) Identification of habitat requirements;

(C) References to any known biological opinion, status reports, or recovery plan pertaining to a listed species;

(D) Extent and location of any federally-designated critical habitat, or other habitat for listed species in the project area; and

(E) Temporal and spatial distribution of the listed species within the project vicinity.

(viii) *Recreation and land use.* A description of the existing recreational and land uses and opportunities within the project boundary. The components of this description include:

(A) Text description illustrated by maps of existing recreational facilities, type of activity supported, location, capacity, ownership and management;

(B) Current recreational use of project lands and waters compared to facility or resource capacity;

(C) Existing shoreline buffer zones within the project boundary;

(D) Current and future recreation needs identified in current State Comprehensive Outdoor Recreation Plans, other applicable plans on file with the Commission, or other relevant local, state, or regional conservation and recreation plans;

(E) If the potential applicant is an existing licensee, its current shoreline management plan or policy, if any, with regard to permitting development of piers, boat docks and landings, bulkheads, and other shoreline facilities on project lands and waters;

(F) A discussion of whether the project is located within or adjacent to a:

(*1*) River segment that is designated as part of, or under study for inclusion in, the National Wild and Scenic River System; or

(*2*) State-protected river segment;

(G) Whether any project lands are under study for inclusion in the National Trails System or designated as, or under study for inclusion as, a Wilderness Area.

(H) Any regionally or nationally important recreation areas in the project vicinity;

(I) Non-recreational land use and management within the project boundary; and

(J) Recreational and non-recreational land use and management adjacent to the project boundary.

(ix) *Aesthetic resources.* A description of the visual characteristics of the lands and waters affected by the project. Components of this description include a description of the dam, natural water features, and other scenic attractions of the project and surrounding vicinity. Potential applicants are encouraged to supplement the text description with visual aids.

(x) *Cultural resources.* A description of the known cultural or historical resources of the proposed project and surrounding area. Components of this description include:

(A) Identification of any historic or archaeological site in the proposed project vicinity, with particular emphasis on sites or properties either listed in, or recommended by the State Historic Preservation Officer or Tribal Historic Preservation Officer for inclusion in, the National Register of Historic Places;

(B) Existing discovery measures, such as surveys, inventories, and limited subsurface testing work, for the purpose of locating, identifying, and assessing the significance of historic and archaeological resources that have been undertaken within or adjacent to the project boundary; and

(C) Identification of Indian tribes that may attach religious and cultural significance to historic properties within the project boundary or in the project vicinity; as well as available information on Indian traditional cultural and religious properties, whether on or off of any federally-recognized Indian reservation (A potential applicant must delete from any information made available under this section specific site or property locations, the disclosure of which would create a risk of harm, theft, or destruction of archaeological or Native American cultural resources or to the site at which the resources are located, or would violate any Federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470w-3, and the National

Historic Preservation Act of 1966, 16 U.S.C. 470hh).

(xi) *Socio-economic resources.* A general description of socio-economic conditions in the vicinity of the project. Components of this description include general land use patterns (*e.g.*, urban, agricultural, forested), population patterns, and sources of employment in the project vicinity.

(xii) *Tribal resources.* A description of Indian tribes, tribal lands, and interests that may be affected by the project Components of this description include:

(A) Identification of information on resources specified in paragraphs (d)(2)(ii)–(xi) of this section to the extent that existing project construction and operation affecting those resources may impact tribal cultural or economic interests, *e.g.*, impacts of project-induced soil erosion on tribal cultural sites; and

(B) Identification of impacts on Indian tribes of existing project construction and operation that may affect tribal interests not necessarily associated with resources specified in paragraphs (d)(3)(ii)–(xi) of this Section, *e.g.*, tribal fishing practices or agreements between the Indian tribe and other entities other than the potential applicant that have a connection to project construction and operation.

(xiii) *River basin description.* A general description of the river basin or subbasin, as appropriate, in which the proposed project is located, including information on:

(A) The area of the river basin or subbasin and length of stream reaches therein;

(B) Major land and water uses in the project area;

(C) All dams and diversion structures in the basin or sub-basin, regardless of function; and

(D) Tributary rivers and streams, the resources of which are or may be affected by project operations;

(4) *Preliminary issues and studies list.* Based on the resource description and impacts discussion required by paragraph (d)(3) of this section; the pre-application document must include with respect to each resource area identified above, a list of:

(i) Issues pertaining to the identified resources;

(ii) Potential studies or information gathering requirements associated with the identified issues;

(iii) Relevant qualifying Federal and state or tribal comprehensive waterway plans; and

(iv) Relevant resource management plans.

(5) *Summary of contacts.* An appendix summarizing contacts with Federal, state, and interstate resource agencies, Indian tribes, non-governmental organizations, or other members of the public made in connection with preparing the pre-application document sufficient to enable the Commission to determine if due diligence has been exercised in obtaining relevant information.

(e) If applicable, the applicant must also provide a statement of whether or not it will seek benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) by satisfying the requirements for qualifying hydroelectric small power production facilities in § 292.203 of this chapter. If benefits under section 210 of PURPA are sought, a statement of whether or not the applicant believes the project is located at a new dam or diversion (as that term is defined in § 292.202(p) of this chapter), and a request for the agencies' view on that belief, if any.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 69957, Dec. 16, 2003]

§ 5.7 Tribal consultation.

A meeting shall be held no later than 30 days following filing of the notification of intent required by § 5.5 between each Indian tribe likely to be affected by the potential license application and the Commission staff if the affected Indian tribe agrees to such meeting.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003]

§ 5.8 Notice of commencement of proceeding and scoping document, or of approval to use traditional licensing process or alternative procedures.

(a) *Notice.* Within 60 days of the notification of intent required under § 5.5, filing of the pre-application document

pursuant to §5.6, and filing of any request to use the traditional licensing process or alternative procedures, the Commission will issue a notice of commencement of proceeding and scoping document or of approval of a request to use the traditional licensing process or alternative procedures.

(b) *Notice contents.* The notice shall include:

(1) The decision of the Director of the Office of Energy Projects on any request to use the traditional licensing process or alternative procedures.

(2) If appropriate, a request by the Commission to initiate informal consultation under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402, section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920, or section 106 of the National Historic Preservation Act and implementing regulations at 36 CFR 800.2, and, if applicable, designation of the potential applicant as the Commission's non-federal representative.

(3) If the potential license application is to be developed and filed pursuant to this part, notice of:

(i) The applicant's intent to file a license application;

(ii) The filing of the pre-application document;

(iii) Commencement of the proceeding;

(iv) A request for comments on the pre-application document (including the proposed process plan and schedule);

(v) A statement that all communications to or from the Commission staff related to the merits of the potential application must be filed with the Commission;

(vi) The request for other Federal or state agencies or Indian tribes to be cooperating agencies for purposes of developing an environmental document;

(vii) The Commission's intent with respect to preparation of an environmental impact statement; and

(viii) A public scoping meeting and site visit to be held within 30 days of the notice.

(c) *Scoping Document 1.* At the same time the Commission issues the notice provided for in paragraph (a) of this Section, the Commission staff will issue Scoping Document 1. Scoping Document 1 will include:

(1) An introductory section describing the purpose of the scoping document, the date and time of the scoping meeting, procedures for submitting written comments, and a request for information or study requests from state and Federal resource agencies, Indian tribes, non-governmental organizations, and individuals;

(2) Identification of the proposed action, including a description of the project's location, facilities, and operation, and any proposed protection and enhancement measures, and other alternatives to the proposed action, including alternatives considered but eliminated from further study, and the no action alternative;

(3) Identification of resource issues to be analyzed in the environmental document, including those that would be cumulatively affected along with a description of the geographic and temporal scope of the cumulatively affected resources;

(4) A list of qualifying Federal and state comprehensive waterway plans;

(5) A list of qualifying tribal comprehensive waterway plans;

(6) A process plan and schedule and a draft outline of the environmental document; and

(7) A list of recipients.

(d) *Scoping meeting and site visit.* The purpose of the public meeting and site visit is to:

(1) Initiate issues scoping pursuant to the National Environmental Policy Act;

(2) Review and discuss existing conditions and resource management objectives;

(3) Review and discuss existing information and make preliminary identification of information and study needs;

(4) Review, discuss, and finalize the process plan and schedule for pre-filing activity that incorporates the time periods provided for in this part and, to the extent reasonably possible, maximizes coordination of Federal, state, and tribal permitting and certification processes, including consultation under section 7 of the Endangered Species

Act and water quality certification or waiver thereof under section 401 of the Clean Water Act; and

(5) Discuss the appropriateness of any Federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document pursuant to the National Environmental Policy Act.

(e) *Method of notice.* The public notice provided for in this section will be given by:

(1) Publishing notice in the FEDERAL REGISTER;

(2) Publishing notice in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated, and, as appropriate, tribal newspapers;

(3) Notifying appropriate Federal, state, and interstate resource agencies, state water quality and coastal zone management plan consistency certification agencies, Indian tribes, and nongovernmental organizations, by electronic means if practical, otherwise by mail.

[Order 2002, 68 FR 51121, Aug. 25, 2003, as amended by Order 653, 70 FR 8724, Feb. 23, 2005]

§5.9 Comments and information or study requests.

(a) *Comments and study requests.* Comments on the pre-application document and the Commission staff's Scoping Document 1 must be filed with the Commission within 60 days following the Commission's notice of consultation procedures issued pursuant to §5.8. Comments, including those by Commission staff, must be accompanied by any information gathering and study requests, and should include information and studies needed for consultation under section 7 of the Endangered Species Act and water quality certification under Section 401 of the Clean Water Act.

(b) *Content of study request.* Any information or study request must:

(1) Describe the goals and objectives of each study proposal and the information to be obtained;

(2) If applicable, explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;

(3) If the requester is a not resource agency, explain any relevant public interest considerations in regard to the proposed study;

(4) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements;

(6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate filed season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers relevant tribal values and knowledge; and

(7) Describe considerations of level of effort and cost, as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs.

(c) *Applicant seeking PURPA benefits; estimate of fees.* If a potential applicant has stated that it intends to seek PURPA benefits, comments on the pre-application document by a fish and wildlife agency must provide the potential applicant with a reasonable estimate of the total costs the agency anticipates it will incur in order to set mandatory terms and conditions for the proposed project. An agency may provide a potential applicant with an updated estimate as it deems necessary. If any agency believes that its most recent estimate will be exceeded by more than 25 percent, it must supply the potential applicant with a new estimate and submit a copy to the Commission.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003; 68 FR 69957, Dec. 16, 2003]

§5.10 Scoping Document 2.

Within 45 days following the deadline for filing of comments on Scoping Document 1, the Commission staff shall, if necessary, issue Scoping Document 2.

§ 5.11 Potential Applicant's proposed study plan and study plan meetings.

(a) Within 45 days following the deadline for filing of comments on the pre-application document, including information and study requests, the potential applicant must file with the Commission a proposed study plan.

(b) The potential applicant's proposed study plan must include with respect to each proposed study:

(1) A detailed description of the study and the methodology to be used;

(2) A schedule for conducting the study;

(3) Provisions for periodic progress reports, including the manner and extent to which information will be shared; and sufficient time for technical review of the analysis and results; and

(4) If the potential applicant does not adopt a requested study, an explanation of why the request was not adopted, with reference to the criteria set forth in § 5.9(b).

(c) The potential applicant's proposed study plan must also include provisions for the initial and updated study reports and meetings provided for in § 5.15.

(d) The applicant's proposed study plan must:

(1) Describe the goals and objectives of each study proposal and the information to be obtained;

(2) Address any known resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;

(3) Describe existing information concerning the subject of the study proposal, and the need for additional information;

(4) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied;

(5) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate, considers any known tribal interests;

(6) Describe considerations of level of effort and cost, as applicable.

(e) The potential applicant's proposed study plan must be accompanied by a proposal for conducting a study plan meeting or meetings during the 90-day period provided for in § 5.12 for the purpose of clarifying the potential applicant's proposed study plan and any initial information gathering or study requests, and to resolve any outstanding issues with respect to the proposed study plan. The initial study plan meeting must be held no later than 30 days after the deadline date for filing of the potential applicant's proposed study plan.

§ 5.12 Comments on proposed study plan.

Comments on the potential applicant's proposed study plan, including any revised information or study requests, must be filed within 90 days after the proposed study plan is filed. This filing must also include an explanation of any study plan concerns and any accommodations reached with the potential applicant regarding those concerns. Any proposed modifications to the potential applicant's proposed study plan must address the criteria in § 5.9(b).

§ 5.13 Revised study plan and study plan determination.

(a) Within 30 days following the deadline for filing comments on the potential applicant's proposed study plan, as provided for in § 5.12, the potential applicant must file a revised study plan for Commission approval. The revised study plan shall include the comments on the proposed study plan and a description of the efforts made to resolve differences over study requests. If the potential applicant does not adopt a requested study, it must explain why the request was not adopted, with reference to the criteria set forth in § 5.9(b).

(b) Within 15 days following filing of the potential applicant's revised study plan, participants may file comments thereon.

(c) Within 30 days following the date the potential applicant files its revised study plan, the Director of Energy

Projects will issue a Study Plan Determination with regard to the potential applicant's study plan, including any modifications determined to be necessary in light of the record.

(d) If no notice of study dispute is filed pursuant to §5.14 within 20 days of the Study Plan Determination, the study plan as approved in the Study Plan Determination shall be deemed to be approved and the potential applicant shall proceed with the approved studies. If a potential applicant fails to obtain or conduct a study as required by Study Plan Determination, its license application may be considered deficient.

§5.14 Formal study dispute resolution process.

(a) Within 20 days of the Study Plan Determination, any Federal agency with authority to provide mandatory conditions on a license pursuant to FPA Section 4(e), 16 U.S.C. 797(e), or to prescribe fishways pursuant to FPA Section 18, 16 U.S.C. 811, or any agency or Indian tribe with authority to issue a water quality certification for the project license under section 401 of the Clean Water Act, 42 U.S.C. 1341, may file a notice of study dispute with respect to studies pertaining directly to the exercise of their authorities under sections 4(e) and 18 of the Federal Power Act or section 401 of the Clean Water Act.

(b) The notice of study dispute must explain how the disputing agency's or Indian tribe's study request satisfies the criteria set forth in §5.9(b), and shall identify and provide contact information for the panel member designated by the disputing agency or Indian tribe, as discussed in paragraph (d) of this section.

(c) Studies and portions of study plans approved in the Study Plan Determination that are not the subject of a notice of dispute shall be deemed to be approved, and the potential applicant shall proceed with those studies or portions thereof.

(d) Within 20 days of a notice of study dispute, the Commission will convene one or more three-person Dispute Resolution Panels, as appropriate to the circumstances of each proceeding. Each such panel will consist of:

(1) A person from the Commission staff who is not otherwise involved in the proceeding, and who shall serve as the panel chair;

(2) One person designated by the Federal or state agency or Indian tribe that filed the notice of dispute who is not otherwise involved in the proceeding; and

(3) A third person selected by the other two panelists from a pre-established list of persons with expertise in the resource area. The two panelists shall make every reasonable effort to select the third panel member. If however no third panel member has been selected by the other two panelists within 15 days, an appropriate third panel member will be selected at random from the list of technical experts maintained by the Commission.

(e) If more than one agency or Indian tribe files a notice of dispute with respect to the decision in the preliminary determination on any information-gathering or study request, the disputing agencies or Indian tribes must select one person to represent their interests on the panel.

(f) The list of persons available to serve as a third panel member will be posted, as revised from time-to-time, on the hydroelectric page of the Commission's Web site. A person on the list who is requested and willing to serve with respect to a specific dispute will be required to file with the Commission at that time a current statement of their qualifications, a statement that they have had no prior involvement with the proceeding in which the dispute has arisen, or other financial or other conflict of interest.

(g) All costs of the panel members representing the Commission staff and the agency or Indian tribe which filed the notice of dispute will be borne by the Commission or the agency or Indian tribe, as applicable. The third panel member will serve without compensation, except for certain allowable travel expenses as defined in 31 CFR part 301.

(h) To facilitate the delivery of information to the dispute resolution panel, the identity of the panel members and their addresses for personal service

with respect to a specific dispute resolution will be posted on the hydroelectric page of the Commission's Web site.

(i) No later than 25 days following the notice of study dispute, the potential applicant may file with the Commission and serve upon the panel members comments and information regarding the dispute.

(j) Prior to engaging in deliberative meetings, the panel shall hold a technical conference for the purpose of clarifying the matters in dispute with reference to the study criteria. The technical conference shall be chaired by the Commission staff member of the panel. It shall be open to all participants, and the panel shall receive information from the participants as it deems appropriate.

(k) No later than 50 days following the notice of study dispute, the panel shall make and deliver to the Director of the Office of Energy Projects a finding, with respect to each information or study request in dispute, concerning the extent to which each criteria set forth in §5.9(b) is met or not met, and why, and make recommendations regarding the disputed study request based on its findings. The panel's findings and recommendations must be based on the record in the proceeding. The panel shall file with its findings and recommendations all of the materials received by the panel. Any recommendation for the potential applicant to provide information or a study must include the technical specifications, including data acquisition techniques and methodologies.

(l) No later than 70 days from the date of filing of the notice of study dispute, the Director of the Office of Energy Projects will review and consider the recommendations of the panel, and will issue a written determination. The Director's determination will be made with reference to the study criteria set forth in §5.9(b) and any applicable law or Commission policies and practices, will take into account the technical expertise of the panel, and will explain why any panel recommendation was rejected, if applicable. The Director's determination shall constitute an amendment to the approved study plan.

§5.15 Conduct of studies.

(a) *Implementation.* The potential applicant must gather information and conduct studies as provided for in the approved study plan and schedule.

(b) *Progress reports.* The potential applicant must prepare and provide to the participants the progress reports provided for in §5.11(b)(3). Upon request of any participant, the potential applicant will provide documentation of study results.

(c) *Initial study report.* (1) Pursuant to the Commission-approved study plan and schedule provided for in §5.13 or no later than one year after Commission approval of the study plan, whichever comes first, the potential applicant must prepare and file with the Commission an initial study report describing its overall progress in implementing the study plan and schedule and the data collected, including an explanation of any variance from the study plan and schedule. The report must also include any modifications to ongoing studies or new studies proposed by the potential applicant.

(2) Within 15 days following the filing of the initial study report, the potential applicant shall hold a meeting with the participants and Commission staff to discuss the study results and the potential applicant's and or other participant's proposals, if any, to modify the study plan in light of the progress of the study plan and data collected.

(3) Within 15 days following the meeting provided for in paragraph (c)(2) of this section, the potential applicant shall file a meeting summary, including any modifications to ongoing studies or new studies proposed by the potential applicant.

(4) Any participant or the Commission staff may file a disagreement concerning the applicant's meeting summary within 30 days, setting forth the basis for the disagreement. This filing must also include any modifications to ongoing studies or new studies proposed by the Commission staff or other participant.

(5) Responses to any filings made pursuant to paragraph (c)(4) of this section must be filed within 30 days.

(6) No later than 30 days following the due date for responses provided for

in paragraph (c)(5) of this section, the Director will resolve the disagreement and amend the approved study plan as appropriate.

(7) If no participant or the Commission staff files a disagreement concerning the potential applicant's meeting summary and request to amend the approved study plan within 30 days, any proposed amendment shall be deemed to be approved.

(d) *Criteria for modification of approved study*. Any proposal to modify an ongoing study pursuant to paragraphs (c)(1)–(4) of this section must be accompanied by a showing of good cause why the proposal should be approved, and must include, as appropriate to the facts of the case, a demonstration that:

(1) Approved studies were not conducted as provided for in the approved study plan; or

(2) The study was conducted under anomalous environmental conditions or that environmental conditions have changed in a material way.

(e) *Criteria for new study*. Any proposal for new information gathering or studies pursuant to paragraphs (c)(1)–(4) of this section must be accompanied by a showing of good cause why the proposal should be approved, and must include, as appropriate to the facts of the case, a statement explaining:

(1) Any material changes in the law or regulations applicable to the information request;

(2) Why the goals and objectives of any approved study could not be met with the approved study methodology;

(3) Why the request was not made earlier;

(4) Significant changes in the project proposal or that significant new information material to the study objectives has become available; and

(5) Why the new study request satisfies the study criteria in §5.9(b).

(f) *Updated study report*. Pursuant to the Commission-approved study plan and schedule provided for in §5.13, or no later than two years after Commission approval of the study plan and schedule, whichever comes first, the potential applicant shall prepare and file with the Commission an updated study report describing its overall progress in implementing the study plan and schedule and the data collected, including an explanation of any variance from the study plan and schedule. The report must also include any modifications to ongoing studies or new studies proposed by the potential applicant. The review, comment, and disagreement resolution provisions of paragraphs (c)(2)–(7) of this section shall apply to the updated study report. Any proposal to modify an ongoing study must be accompanied by a showing of good cause why the proposal should be approved as set forth in paragraph (d) of this section. Any proposal for new information gathering or studies is subject to paragraph (e) of this section except that the proponent must demonstrate extraordinary circumstances warranting approval. The applicant must promptly proceed to complete any remaining undisputed information-gathering or studies under its proposed amendments to the study plan, if any, and must proceed to complete any information-gathering or studies that are the subject of a disagreement upon the Director's resolution of the disagreement.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003]

§5.16 Preliminary licensing proposal.

(a) No later than 150 days prior to the deadline for filing a new or subsequent license application, if applicable, the potential applicant must file for comment a preliminary licensing proposal.

(b) The preliminary licensing proposal must:

(1) Clearly describe, as applicable, the existing and proposed project facilities, including project lands and waters;

(2) Clearly describe, as applicable, the existing and proposed project operation and maintenance plan, to include measures for protection, mitigation, and enhancement measures with respect to each resource affected by the project proposal; and

(3) Include the potential applicant's draft environmental analysis by resource area of the continuing and incremental impacts, if any, of its preliminary licensing proposal, including the results of its studies conducted under the approved study plan.

(c) A potential applicant may elect to file a draft license application which

includes the contents of a license application required by § 5.18 instead of the Preliminary Licensing Proposal. A potential applicant that elects to file a draft license application must include notice of its intent to do so in the updated study report required by § 5.15(f).

(d) A potential applicant that has been designated as the Commission's non-Federal representative may include a draft Biological Assessment, draft Essential Fish Habitat Assessment, and draft Historic Properties Management Plan with its Preliminary Licensing Proposal or draft license application.

(e) Within 90 days of the date the potential applicant files the Preliminary Licensing Proposal or draft license application, participants and the Commission staff may file comments on the Preliminary Licensing Proposal or draft application, which may include recommendations on whether the Commission should prepare an Environmental Assessment (with or without a draft Environmental Assessment) or an Environmental Impact Statement. Any participant whose comments request new information, studies, or other amendments to the approved study plan must include a demonstration of extraordinary circumstances, pursuant to the requirements of § 5.15(f).

(f) A waiver of the requirement to file the Preliminary Licensing Proposal or draft license application may be requested, based on a consensus of the participants in favor of such waiver.

§ 5.17 Filing of application.

(a) *Deadline—new or subsequent license application.* An application for a new or subsequent license must be filed no later than 24 months before the existing license expires.

(b) *Subsequent licenses.* An applicant for a subsequent license must file its application under part I of the Federal Power Act. The provisions of section 7(a) of the Federal Power Act do not apply to licensing proceedings involving a subsequent license.

(c) *Rejection or dismissal of application.* If the Commission rejects or dismisses an application for a new or subsequent license filed under this part pursuant to the provisions of § 5.20, the application may not be refiled after the new or subsequent license application filing deadline specified in paragraph (a) of this section.

(d)(1) *Filing and service.* Each applicant for a license under this part must submit the application to the Commission's Secretary for filing pursuant to the requirements of subpart T of part 385 of this chapter. The applicant must serve one copy of the application on the Director of the Commission's Regional Office for the appropriate region and on each resource agency, Indian tribe, or member of the public consulted pursuant to this part.

(2) An applicant must publish notice twice of the filing of its application, no later than 14 days after the filing date in a daily or weekly newspaper of general circulation in each county in which the project is located. The notice must disclose the filing date of the application and briefly summarize it, including the applicant's name and address, the type of facility applied for, its proposed location, and the places where the information specified in § 5.2(b) is available for inspection and reproduction. The applicant must promptly provide the Commission with proof of the publication of this notice.

(e) *PURPA benefits.* (1) Every application for a license for a project with a capacity of 80 megawatts or less must include in its application copies of the statements made under § 4.38(b)(1)(vi).

(2) If an applicant reverses a statement of intent not to seek PURPA benefits:

(i) Prior to the Commission issuing a license, the reversal of intent will be treated as an amendment of the application under § 4.35 of this chapter and the applicant must:

(A) Repeat the pre-filing consultation process under this part; and

(B) Satisfy all the requirements in § 292.208 of this chapter; or

(ii) After the Commission issues a license for the project, the applicant is prohibited from obtaining PURPA benefits.

(f) *Limitations on submitting applications.* The provisions of §§ 4.33(b), (c), and (e) of this chapter apply to license applications filed under this Section.

(g) *Applicant notice.* An applicant for a subsequent license that proposes to

expand an existing project to encompass additional lands must include in its application a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

§5.18 Application content.

(a) *General content requirements.* Each license application filed pursuant to this part must:

(1) Identify every person, citizen, association of citizens, domestic corporation, municipality, or state that has or intends to obtain and will maintain any proprietary right necessary to construct, operate, or maintain the project;

(2) Identify (providing names and mailing addresses):

(i) Every county in which any part of the project, and any Federal facilities that would be used by the project, would be located;

(ii) Every city, town, or similar local political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That has a population of 5,000 or more people and is located within 15 miles of the project dam;

(iii) Every irrigation district, drainage district, or similar special purpose political subdivision:

(A) In which any part of the project, and any Federal facilities that would be used by the project, would be located; or

(B) That owns, operates, maintains, or uses any project facilities that would be used by the project;

(iv) Every other political subdivision in the general area of the project that there is reason to believe would likely be interested in, or affected by, the application; and

(v) All Indian tribes that may be affected by the project.

(3)(i) For a license (other than a license under section 15 of the Federal Power Act) state that the applicant has made, either at the time of or before filing the application, a good faith effort to give notification by certified mail of the filing of the application to:

(A) Every property owner of record of any interest in the property within the bounds of the project, or in the case of the project without a specific project boundary, each such owner of property which would underlie or be adjacent to any project works including any impoundments; and

(B) The entities identified in paragraph (a)(2) of this section, as well as any other Federal, state, municipal or other local government agencies that there is reason to believe would likely be interested in or affected by such application.

(ii) Such notification must contain the name, business address, and telephone number of the applicant and a copy of the Exhibit G contained in the application, and must state that a license application is being filed with the Commission.

(4)(i) As to any facts alleged in the application or other materials filed, be subscribed and verified under oath in the form set forth in paragraph (a)(3)(B) of this Section by the person filing, an officer thereof, or other person having knowledge of the matters set forth. If the subscription and verification is by anyone other than the person filing or an officer thereof, it must include a statement of the reasons therefor.

(ii) This application is executed in the:

State of _____
County of _____
By: _____
(Name) _____
(Address) _____

being duly sworn, depose(s) and say(s) that the contents of this application are true to the best of (his or her) knowledge or belief. The undersigned Applicant(s) has (have) signed the application this ____ day of _____, 2_____.

_____
(Applicant(s))
By: _____

Subscribed and sworn to before me, a [Notary Public, or title of other official authorized by the state to notarize documents, as appropriate] this ____ day of _____, 2_____.

/SEAL [if any]
(Notary Public, or other authorized official)

(5) Contain the information and documents prescribed in the following Sections of this chapter, except as provided in paragraph (b) of this Section, according to the type of application:

(i) License for a minor water power project and a major water power project 5 MW or less: § 4.61 (General instructions, initial statement, and Exhibits A, B, C, D, F, and G);

(ii) License for a major unconstructed project and a major modified project: § 4.41 of this chapter (General instructions, initial statement, Exhibits A, B, C, D, F, and G);

(iii) License for a major project—existing dam: § 4.51 of this chapter (General instructions, initial statement, Exhibits A, B, C, D, F, and G); or

(iv) License for a project located at a new dam or diversion where the applicant seeks PURPA benefits: § 292.208 of this chapter.

(b) *Exhibit E—Environmental Exhibit.* The specifications for Exhibit E in §§ 4.41, 4.51, or 4.61 of this chapter shall not apply to applications filed under this part. The Exhibit E included in any license application filed under this part must address the resources listed in the Pre-Application Document provided for in § 5.6; follow the Commission's ''Preparing Environmental Assessments: Guidelines for Applicants, Contractors, and Staff,'' as they may be updated from time-to-time; and meet the following format and content requirements:

(1) *General description of the river basin.* Describe the river system, including relevant tributaries; give measurements of the area of the basin and length of stream; identify the project's river mile designation or other reference point; describe the topography and climate; and discuss major land uses and economic activities.

(2) *Cumulative effects.* List cumulatively affected resources based on the Commission's Scoping Document, consultation, and study results. Discuss the geographic and temporal scope of analysis for those resources. Describe how resources are cumulatively affected and explain the choice of the geographic scope of analysis. Include a brief discussion of past, present, and future actions, and their effects on resources based on the new license term (30–50 years). Highlight the effect on the cumulatively affected resources from reasonably foreseeable future actions. Discuss past actions' effects on the resource in the Affected Environment Section.

(3) *Applicable laws.* Include a discussion of the status of compliance with or consultation under the following laws, if applicable:

(i) *Section 401 of the Clean Water Act.* The applicant must file a request for a water quality certification (WQC), as required by Section 401 of the Clean Water Act no later than the deadline specified in § 5.23(b). Potential applicants are encouraged to consult with the certifying agency or tribe concerning information requirements as early as possible.

(ii) *Endangered Species Act (ESA).* Briefly describe the process used to address project effects on Federally listed or proposed species in the project vicinity. Summarize any anticipated environmental effects on these species and provide the status of the consultation process. If the applicant is the Commission's non-Federal designee for informal consultation under the ESA, the applicant's draft biological assessment must be included.

(iii) *Magnuson-Stevens Fishery Conservation and Management Act.* Document from the National Marine Fisheries Service (NMFS) and/or the appropriate Regional Fishery Management Council any essential fish habitat (EFH) that may be affected by the project. Briefly discuss each managed species and life stage for which EFH was designated. Include, as appropriate, the abundance, distribution, available habitat, and habitat use by the managed species. If the project may affect EFH, prepare a draft ''EFH Assessment'' of the impacts of the project. The draft EFH Assessment should contain the information outlined in 50 CFR 600.920(e).

(iv) *Coastal Zone Management Act (CZMA).* Section 307(c)(3) of the CZMA requires that all Federally licensed and permitted activities be consistent with approved state Coastal Zone Management Programs. If the project is located within a coastal zone boundary

or if a project affects a resource located in the boundaries of the designated coastal zone, the applicant must certify that the project is consistent with the state Coastal Zone Management Program. If the project is within or affects a resource within the coastal zone, provide the date the applicant sent the consistency certification information to the state agency, the date the state agency received the certification, and the date and action taken by the state agency (for example, the agency will either agree or disagree with the consistency statement, waive it, or ask for additional information). Describe any conditions placed on the state agency's concurrence and assess the conditions in the appropriate section of the license application. If the project is not in or would not affect the coastal zone, state so and cite the coastal zone program office's concurrence.

(v) *National Historic Preservation Act (NHPA).* Section 106 of NHPA requires the Commission to take into account the effect of licensing a hydropower project on any historic properties, and allow the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment on the proposed action. ''Historic Properties'' are defined as any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places (NRHP). If there would be an adverse effect on historic properties, the applicant may include a Historic Properties Management Plan (HPMP) to avoid or mitigate the effects. The applicant must include documentation of consultation with the Advisory Council, the State Historic Preservation Officer, Tribal Historic Preservation Officer, National Park Service, members of the public, and affected Indian tribes, where applicable.

(vi) *Pacific Northwest Power Planning and Conservation Act (Act).* If the project is not within the Columbia River Basin, this section shall not be included. The Columbia River Basin Fish and Wildlife Program (Program) developed under the Act directs agencies to consult with Federal and state fish and wildlife agencies, appropriate Indian tribes, and the Northwest Power Planning Council (Council) during the study, design, construction, and operation of any hydroelectric development in the basin. Section 12.1A of the Program outlines conditions that should be provided for in any original or new license. The program also designates certain river reaches as protected from development. The applicant must document consultation with the Council, describe how the act applies to the project, and how the proposal would or would not be consistent with the program.

(vii) *Wild and Scenic Rivers and Wilderness Acts.* Include a description of any areas within or in the vicinity of the proposed project boundary that are included in, or have been designated for study for inclusion in, the National Wild and Scenic Rivers System, or that have been designated as wilderness area, recommended for such designation, or designated as a wilderness study area under the Wilderness Act.

(4) *Project facilities and operation.* Provide a description of the project to include:

(i) Maps showing existing and proposed project facilities, lands, and waters within the project boundary;

(ii) The configuration of any dams, spillways, penstocks, canals, powerhouses, tailraces, and other structures;

(iii) The normal maximum water surface area and normal maximum water surface elevation (mean sea level), gross storage capacity of any impoundments;

(iv) The number, type, and minimum and maximum hydraulic capacity and installed (rated) capacity of existing and proposed turbines or generators to be included as part of the project;

(v) An estimate of the dependable capacity, and average annual energy production in kilowatt hours (or mechanical equivalent);

(vi) A description of the current (if applicable) and proposed operation of the project, including any daily or seasonal ramping rates, flushing flows, reservoir operations, and flood control operations.

(5) *Proposed action and action alternatives.* (i) The environmental document must explain the effects of the

applicant's proposal on resources. For each resource area addressed include:

(A) A discussion of the affected environment;

(B) A detailed analysis of the effects of the applicant's licensing proposal and, if reasonably possible, any preliminary terms and conditions filed with the Commission; and

(C) Any unavoidable adverse impacts.

(ii) The environmental document must contain, with respect to the resources listed in the Pre-Application Document provided for in §5.6, and any other resources identified in the Commission's scoping document prepared pursuant to the National Environmental Policy Act and §5.8, the following information, commensurate with the scope of the project:

(A) *Affected environment.* The applicant must provide a detailed description of the affected environment or area(s) to be affected by the proposed project by each resource area. This description must include the information on the affected environment filed in the Pre-Application Document provided for in §5.6, developed under the applicant's approved study plan, and otherwise developed or obtained by the applicant. This section must include a general description of socio-economic conditions in the vicinity of the project including general land use patterns (*e.g.*, urban, agricultural, forested), population patterns, and sources of employment in the project vicinity.

(B) *Environmental analysis.* The applicant must present the results of its studies conducted under the approved study plan by resource area and use the data generated by the studies to evaluate the beneficial and adverse environmental effects of its proposed project. This section must also include, if applicable, a description of any anticipated continuing environmental impacts of continued operation of the project, and the incremental impact of proposed new development of project works or changes in project operation. This analysis must be based on the information filed in the Pre-Application Document provided for in §5.6, developed under the applicant's approved study plan, and other appropriate information, and otherwise developed or obtained by the Applicant.

(C) *Proposed environmental measures.* The applicant must provide, by resource area, any proposed new environmental measures, including, but not limited to, changes in the project design or operations, to address the environmental effects identified above and its basis for proposing the measures. The applicant must describe how each proposed measure would protect or enhance the existing environment, including, where possible, a non-monetary quantification of the anticipated environmental benefits of the measure. This section must also include a statement of existing measures to be continued for the purpose of protecting and improving the environment and any proposed preliminary environmental measures received from the consulted resource agencies, Indian tribes, or the public. If an applicant does not adopt a preliminary environmental measure proposed by a resource agency, Indian tribe, or member of the public, it must include its reasons, based on project-specific information.

(D) *Unavoidable adverse impacts.* Based on the environmental analysis, discuss any adverse impacts that would occur despite the recommended environmental measures. Discuss whether any such impacts are short- or long-term, minor or major, cumulative or site-specific.

(E) *Economic analysis.* The economic analysis must include annualized, current cost-based information. For a new or subsequent license, the applicant must include the cost of operating and maintaining the project under the existing license. For an original license, the applicant must estimate the cost of constructing, operating, and maintaining the proposed project. For either type of license, the applicant should estimate the cost of each proposed resource protection, mitigation, or enhancement measure and any specific measure filed with the Commission by agencies, Indian tribes, or members of the public when the application is filed. For an existing license, the applicant's economic analysis must estimate the value of developmental resources associated with the project under the current license and the applicant's proposal. For an original license, the applicant must estimate the value

of the developmental resources for the proposed project. As applicable, these developmental resources may include power generation, water supply, irrigation, navigation, and flood control. Where possible, the value of developmental resources must be based on market prices. If a protection, mitigation, or enhancement measure reduces the amount or value of the project's developmental resources, the applicant must estimate the reduction.

(F) *Consistency with comprehensive plans.* Identify relevant comprehensive plans and explain how and why the proposed project would, would not, or should not comply with such plans and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan.

(G) *Consultation Documentation.* Include a list containing the name, and address of every Federal, state, and interstate resource agency, Indian tribe, or member of the public with which the applicant consulted in preparation of the Environmental Document.

(H) *Literature cited.* Cite all materials referenced including final study reports, journal articles, other books, agency plans, and local government plans.

(2) The applicant must also provide in the Environmental Document:

(A) Functional design drawings of any fish passage and collection facilities or any other facilities necessary for implementation of environmental measures, indicating whether the facilities depicted are existing or proposed (these drawings must conform to the specifications of §4.39 of this chapter regarding dimensions of full-sized prints, scale, and legibility);

(B) A description of operation and maintenance procedures for any existing or proposed measures or facilities;

(C) An implementation or construction schedule for any proposed measures or facilities, showing the intervals following issuance of a license when implementation of the measures or construction of the facilities would be commenced and completed;

(D) An estimate of the costs of construction, operation, and maintenance, of any proposed facilities, and of implementation of any proposed environmental measures.

(E) A map or drawing that conforms to the size, scale, and legibility requirements of §4.39 of this chapter showing by the use of shading, crosshatching, or other symbols the identity and location of any measures or facilities, and indicating whether each measure or facility is existing or proposed (the map or drawings in this exhibit may be consolidated).

(c) *Exhibit H.* The information required to be provided by this paragraph (c) must be included in the application as a separate exhibit labeled ''Exhibit H.''

(1) *Information to be provided by an applicant for new license: Filing requirements*—(i) *Information to be supplied by all applicants.* All Applicants for a new license under this part must file the following information with the Commission:

(A) A discussion of the plans and ability of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service, including efforts and plans to:

(*1*) Increase capacity or generation at the project;

(*2*) Coordinate the operation of the project with any upstream or downstream water resource projects; and

(*3*) Coordinate the operation of the project with the applicant's or other electrical systems to minimize the cost of production.

(B) A discussion of the need of the applicant over the short and long term for the electricity generated by the project, including:

(*1*) The reasonable costs and reasonable availability of alternative sources of power that would be needed by the applicant or its customers, including wholesale customers, if the applicant is not granted a license for the project;

(*2*) A discussion of the increase in fuel, capital, and any other costs that would be incurred by the applicant or its customers to purchase or generate power necessary to replace the output of the licensed project, if the applicant is not granted a license for the project;

(*3*) The effect of each alternative source of power on:

(*i*) The applicant's customers, including wholesale customers;

(*ii*) The applicant's operating and load characteristics; and

(*iii*) The communities served or to be served, including any reallocation of costs associated with the transfer of a license from the existing licensee.

(C) The following data showing need and the reasonable cost and availability of alternative sources of power:

(*1*) The average annual cost of the power produced by the project, including the basis for that calculation;

(*2*) The projected resources required by the applicant to meet the applicant's capacity and energy requirements over the short and long term including:

(*i*) Energy and capacity resources, including the contributions from the applicant's generation, purchases, and load modification measures (such as conservation, if considered as a resource), as separate components of the total resources required;

(*ii*) A resource analysis, including a statement of system reserve margins to be maintained for energy and capacity; and

(*iii*) If load management measures are not viewed as resources, the effects of such measures on the projected capacity and energy requirements indicated separately;

(*iv*) For alternative sources of power, including generation of additional power at existing facilities, restarting deactivated units, the purchase of power off-system, the construction or purchase and operation of a new power plant, and load management measures such as conservation: The total annual cost of each alternative source of power to replace project power; the basis for the determination of projected annual cost; and a discussion of the relative merits of each alternative, including the issues of the period of availability and dependability of purchased power, average life of alternatives, relative equivalent availability of generating alternatives, and relative impacts on the applicant's power system reliability and other system operating characteristics; and the effect on the direct providers (and their immediate customers) of alternate sources of power.

(D) If an applicant uses power for its own industrial facility and related operations, the effect of obtaining or losing electricity from the project on the operation and efficiency of such facility or related operations, its workers, and the related community.

(E) If an applicant is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such Indian tribe for electricity generated by the project to foster the purposes of the reservation.

(F) A comparison of the impact on the operations and planning of the applicant's transmission system of receiving or not receiving the project license, including:

(*1*) An analysis of the effects of any resulting redistribution of power flows on line loading (with respect to applicable thermal, voltage, or stability limits), line losses, and necessary new construction of transmission facilities or upgrading of existing facilities, together with the cost impact of these effects;

(*2*) An analysis of the advantages that the applicant's transmission system would provide in the distribution of the project's power; and

(*3*) Detailed single-line diagrams, including existing system facilities identified by name and circuit number, that show system transmission elements in relation to the project and other principal interconnected system elements. Power flow and loss data that represent system operating conditions may be appended if applicants believe such data would be useful to show that the operating impacts described would be beneficial.

(G) If the applicant has plans to modify existing project facilities or operations, a statement of the need for, or usefulness of, the modifications, including at least a reconnaissance-level study of the effect and projected costs of the proposed plans and any alternate plans, which in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in Section 10(a)(1) of the Federal Power Act.

(H) If the applicant has no plans to modify existing project facilities or operations, at least a reconnaissance-level study to show that the project facilities or operations in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in Section 10(a)(1) of the Federal Power Act.

(I) A statement describing the applicant's financial and personnel resources to meet its obligations under a new license, including specific information to demonstrate that the applicant's personnel are adequate in number and training to operate and maintain the project in accordance with the provisions of the license.

(J) If an applicant proposes to expand the project to encompass additional lands, a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

(K) The applicant's electricity consumption efficiency improvement program, as defined under Section 10(a)(2)(C) of the Federal Power Act, including:

(*1*) A statement of the applicant's record of encouraging or assisting its customers to conserve electricity and a description of its plans and capabilities for promoting electricity conservation by its customers; and

(*2*) A statement describing the compliance of the applicant's energy conservation programs with any applicable regulatory requirements.

(L) The names and mailing addresses of every Indian tribe with land on which any part of the proposed project would be located or which the applicant reasonably believes would otherwise be affected by the proposed project.

(ii) *Information to be provided by an applicant licensee.* An existing licensee that applies for a new license must provide:

(A) The information specified in paragraph (c)(1) of this section.

(B) A statement of measures taken or planned by the licensee to ensure safe management, operation, and maintenance of the project, including:

(*1*) A description of existing and planned operation of the project during flood conditions;

(*2*) A discussion of any warning devices used to ensure downstream public safety;

(*3*) A discussion of any proposed changes to the operation of the project or downstream development that might affect the existing Emergency Action Plan, as described in subpart C of part 12 of this chapter, on file with the Commission;

(*4*) A description of existing and planned monitoring devices to detect structural movement or stress, seepage, uplift, equipment failure, or water conduit failure, including a description of the maintenance and monitoring programs used or planned in conjunction with the devices; and

(*5*) A discussion of the project's employee safety and public safety record, including the number of lost-time accidents involving employees and the record of injury or death to the public within the project boundary.

(C) A description of the current operation of the project, including any constraints that might affect the manner in which the project is operated.

(D) A discussion of the history of the project and record of programs to upgrade the operation and maintenance of the project.

(E) A summary of any generation lost at the project over the last five years because of unscheduled outages, including the cause, duration, and corrective action taken.

(F) A discussion of the licensee's record of compliance with the terms and conditions of the existing license, including a list of all incidents of noncompliance, their disposition, and any documentation relating to each incident.

(G) A discussion of any actions taken by the existing licensee related to the project which affect the public.

(H) A summary of the ownership and operating expenses that would be reduced if the project license were transferred from the existing licensee.

(I) A statement of annual fees paid under part I of the Federal Power Act for the use of any Federal or Indian

lands included within the project boundary.

(iii) *Information to be provided by an applicant who is not an existing licensee.* An applicant that is not an existing licensee must provide:

(A) The information specified in paragraph (c)(1) of this section.

(B) A statement of the applicant's plans to manage, operate, and maintain the project safely, including:

(*1*) A description of the differences between the operation and maintenance procedures planned by the applicant and the operation and maintenance procedures of the existing licensee;

(*2*) A discussion of any measures proposed by the applicant to implement the existing licensee's Emergency Action Plan, as described in subpart C of part 12 of this chapter, and any proposed changes;

(*3*) A description of the applicant's plans to continue safety monitoring of existing project instrumentation and any proposed changes; and

(*4*) A statement indicating whether or not the applicant is requesting the licensee to provide transmission services under section 15(d) of the Federal Power Act.

(d) *Consistency with comprehensive plans.* An application for license under this part must include an explanation of why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in §2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan.

(e) *Response to information requests.* An application for license under this Section must respond to any requests for additional information-gathering or studies filed with comments on its preliminary licensing proposal or draft license application. If the license applicant agrees to do the information-gathering or study, it must provide the information or include a plan and schedule for doing so, along with a schedule for completing any remaining work under the previously approved study plan, as it may have been amended. If the applicant does not agree to any additional information-gathering or study requests made in comments on the draft license application, it must explain the basis for declining to do so.

(f) *Maps and drawings.* All required maps and drawings must conform to the specifications of §4.39 of this chapter.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003; 68 FR 69957, Dec. 16, 2003]

§ 5.19 Tendering notice and schedule.

(a) *Notice.* Within 14 days of the filing date of any application for a license developed pursuant to this part, the Commission will issue public notice of the tendering for filing of the application. The tendering notice will include a preliminary schedule for expeditious processing of the application, including dates for:

(1) Issuance of the acceptance for filing and ready for environmental analysis notice provided for in §5.22.

(2) Filing of recommendations, preliminary terms and conditions, and fishway prescriptions;

(3) Issuance of a draft environmental assessment or environmental impact statement, or an environmental assessment not preceded by a draft.

(4) Filing of comments on the draft environmental assessment or environmental impact statement, as applicable;

(5) Filing of modified recommendations, mandatory terms and conditions, and fishway prescriptions in response to a draft NEPA document or Environmental Analysis, if no draft NEPA document is issued;

(6) Issuance of a final NEPA document, if any;

(7) In the case of a new or subsequent license application, a deadline for submission of final amendments, if any, to the application; and

(8) Readiness of the application for Commission decision.

(b) *Modifications to process plan and schedule.* The tendering notice shall also include any known modifications to the schedules developed pursuant to §5.8 for completion of consultation under section 7 of the Endangered Species Act and water quality certification under section 401 of the Clean Water Act.

(c) *Method of notice.* The public notice provided for in paragraphs (a) and (b) of this Section will be given by:

(1) Publishing notice in the FEDERAL REGISTER; and

(2) Notifying appropriate Federal, state, and interstate resource agencies, state water quality and coastal zone management plan consistency certification agencies, Indian tribes, and nongovernmental organizations, by electronic means if practical, otherwise by mail.

(d) *Resolution of pending information requests.* Within 30 days of the filing date of any application for a license developed pursuant to this part, the Director of the Office of Energy Projects will issue an order resolving any requests for additional information-gathering or studies made in comments on the preliminary licensing proposal or draft license application.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61742, Oct. 30, 2003; 68 FR 69957, Dec. 16, 2003; Order 653, 70 FR 8724, Feb. 23, 2005]

§5.20 Deficient applications.

(a) *Deficient applications.* (1) If an applicant believes that its application conforms adequately to the pre-filing consultation and filing requirements of this part without containing certain required materials or information, it must explain in detail why the material or information is not being submitted and what steps were taken by the applicant to provide the material or information.

(2) Within 30 days of the filing date of any application for a license under this part, the Director of the Office of Energy Projects will notify the applicant if, in the Director's judgment, the application does not conform to the prefiling consultation and filing requirements of this part, and is therefore considered deficient. An applicant having a deficient application will be afforded additional time to correct the deficiencies, not to exceed 90 days from the date of notification. Notification will be by letter or, in the case of minor deficiencies, by telephone. Any notification will specify the deficiencies to be corrected. Deficiencies must be corrected by submitting an a filing pursuant to the requirements of subpart T of part 385 of this chapter within the time specified in the notification of deficiency.

(3) If the revised application is found not to conform to the prefiling consultation and filing requirements of this part, or if the revisions are not timely submitted, the revised application will be rejected. Procedures for rejected applications are specified in paragraph (b)(3) of this section.

(b) *Patently deficient applications.* (1) If, within 30 days of its filing date, the Director of the Office of Energy Projects determines that an application patently fails to substantially comply with the prefiling consultation and filing requirements of this part, or is for a project that is precluded by law, the application will be rejected as patently deficient with the specification of the deficiencies that render the application patently deficient.

(2) If, after 30 days following its filing date, the Director of the Office of Energy Projects determines that an application patently fails to comply with the prefiling consultation and filing requirements of this part, or is for a project that is precluded by law:

(i) The application will be rejected by order of the Commission, if the Commission determines that it is patently deficient; or

(ii) The application will be considered deficient under paragraph (a)(2) of this Section, if the Commission determines that it is not patently deficient.

(3) Any application for an original license that is rejected may be submitted if the deficiencies are corrected and if, in the case of a competing application, the resubmittal is timely. The date the rejected application is resubmitted will be considered the new filing date for purposes of determining its timeliness under §4.36 of this chapter and the disposition of competing applications under §4.37 of this chapter.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61743, Oct. 30, 2003]

§5.21 Additional information.

An applicant may be required to submit any additional information or documents that the Commission considers relevant for an informed decision on the application. The information or documents must take the form, and must be submitted within the time,

that the Commission prescribes. An applicant may also be required to provide within a specified time additional copies of the complete application, or any of the additional information or documents that are filed, to the Commission or to any person, agency, Indian tribe or other entity that the Commission specifies. If an applicant fails to provide timely additional information, documents, or copies of submitted materials as required, the Commission may dismiss the application, hold it in abeyance, or take other appropriate action under this chapter or the Federal Power Act.

§ 5.22 Notice of acceptance and ready for environmental analysis.

(a) When the Commission has determined that the application meets the Commission's requirements as specified in §§ 5.18 and 5.19, the approved studies have been completed, any deficiencies in the application have been cured, and no other additional information is needed, it will issue public notice as required in the Federal Power Act:

(1) Accepting the application for filing and specifying the date upon which the application was accepted for filing (which will be the application filing date if the Secretary receives all of the information and documents necessary to conform to the requirements of §§ 5.1 through 5.21, as applicable, within the time frame prescribed in § 5.20 or § 5.21);

(2) Finding that the application is ready for environmental analysis;

(3) Requesting comments, protests, and interventions;

(4) Requesting recommendations, preliminary terms and conditions, and preliminary fishway prescriptions, including all supporting documentation; and

(5) Establishing the date for final amendments to applications for new or subsequent licenses; and

(6) Updating the schedule issued with the tendering notice for processing the application.

(b) If the project affects lands of the United States, the Commission will notify the appropriate Federal office of the application and the specific lands affected, pursuant to Section 24 of the Federal Power Act.

(c) For an application for a license seeking benefits under Section 210 of the Public Utility Regulatory Polices Act of 1978, as amended, for a project that would be located at a new dam or diversion, the Applicant must serve the public notice issued under paragraph (a)(1) of this Section to interested agencies at the time the applicant is notified that the application is accepted for filing.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61743, Oct. 30, 2003]

§ 5.23 Response to notice.

(a) *Comments and reply comments.* Comments, protests, interventions, recommendations, and preliminary terms and conditions or preliminary fishway prescriptions must be filed no later than 60 days after the notice of acceptance and ready for environmental analysis. All reply comments must be filed within 105 days of that notice.

(b) *Water quality certification.* (1) With regard to certification requirements for a license applicant under Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), the license applicant must file no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis provide for in § 5.22:

(i) A copy of the water quality certification;

(ii) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(iii) Evidence of waiver of water quality certification as described in paragraph (b)(5)(2) of this Section.

(2) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(3) Notwithstanding any other provision in 18 CFR part 4, subpart B, any application to amend an existing license, and any application to amend a

pending application for a license, requires a new request for water quality certification pursuant to §4.34(b)(5) of this chapter if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

§ 5.24 Applications not requiring a draft NEPA document.

(a) If the Commission determines that a license application will be processed with an environmental assessment rather than an environmental impact statement and that a draft environmental assessment will not be required, the Commission will issue the environmental assessment for comment no later than 120 days from the date responses are due to the notice of acceptance and ready for environmental analysis.

(b) Each environmental assessment issued pursuant to this paragraph must include draft license articles, a preliminary determination of consistency of each fish and wildlife agency recommendation made pursuant to Federal Power Act section 10(j) with the purposes and requirements of the Federal Power Act and other applicable law, as provided for in §5.26, and any preliminary mandatory terms and conditions and fishway prescriptions.

(c) Comments on an environmental assessment issued pursuant to paragraph (a) of this section, including comments in response to the Commission's preliminary determination with respect to fish and wildlife agency recommendations and on preliminary mandatory terms and conditions or fishway prescriptions, must be filed no later than 30 or 45 days after issuance of the environmental assessment, as specified in the notice accompanying issuance of the environmental assessment, as should any revisions to supporting documentation.

(d) Modified mandatory prescriptions or terms and conditions must be filed no later than 60 days following the date for filing of comments provided for in paragraph (c) of this section, as specified in the notice accompanying issuance of the environmental analysis.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61743, Oct. 30, 2003]

§ 5.25 Applications requiring a draft NEPA document.

(a) If the Commission determines that a license application will be processed with an environmental impact statement, or a draft and final environmental assessment, the Commission will issue the draft environmental impact statement or environmental assessment for comment no later than 180 days from the date responses are due to the notice of acceptance and ready for environmental analysis provided for in §5.22.

(b) Each draft environmental document will include for comment draft license articles, a preliminary determination of the consistency of each fish and wildlife agency recommendation made pursuant to section 10(j) of the Federal Power Act with the purposes and requirements of the Federal Power Act and other applicable law, as provided for in §5.26, and any preliminary mandatory terms and conditions and fishways prescriptions.

(c) Comments on a draft environmental document issued pursuant to paragraph (b) of this section, including comments in response to the Commission's preliminary determination with respect to fish and wildlife agency recommendations and on preliminary mandatory terms and conditions or prescriptions must be filed no later than 30 or 60 days after issuance of the draft environmental document, as specified in the notice accompanying issuance of the draft environmental document.

(d) Modified mandatory prescriptions or terms and conditions must be filed no later than 60 days following the date for filing of comments provided for in paragraph (c) of this section.

(e) The Commission will issue a final environmental document within 90 days following the date for filing of modified mandatory prescriptions or terms and conditions.

§ 5.26 Section 10(j) process.

(a) In connection with its environmental review of an application for license, the Commission will analyze all terms and conditions timely recommended by fish and wildlife agencies

pursuant to the Fish and Wildlife Coordination Act for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the proposed project. Submission of such recommendations marks the beginning of the process under section 10(j) of the Federal Power Act.

(b) The agency must specifically identify and explain the recommendations and the relevant resource goals and objectives and their evidentiary or legal basis. The Commission may seek clarification of any recommendation from the appropriate fish and wildlife agency. If the Commission's request for clarification is communicated in writing, copies of the request will be sent by the Commission to all parties, affected resource agencies, and Indian tribes, which may file a response to the request for clarification within the time period specified by the Commission. If the Commission believes any fish and wildlife recommendation may be inconsistent with the Federal Power Act or other applicable law, the Commission will make a preliminary determination of inconsistency in the draft environmental document or, if none, the environmental assessment. The preliminary determination, for any recommendations believed to be inconsistent, shall include an explanation why the Commission believes the recommendation is inconsistent with the Federal Power Act or other applicable law, including any supporting analysis and conclusions and an explanation of how the measures recommended in the environmental document would adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project.

(c) Any party, affected resource agency, or Indian tribe may file comments in response to the preliminary determination of inconsistency, including any modified recommendations, within the time frame allotted for comments on the draft environmental document or, if none, the time frame for comments on the environmental assessment. In this filing, the fish and wildlife agency concerned may also request a meeting, telephone or video conference, or other additional procedure to attempt to resolve any preliminary determination of inconsistency.

(d) The Commission shall attempt, with the agencies, to reach a mutually acceptable resolution of any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of the fish and wildlife agency. If the Commission decides, or an affected resource agency requests, the Commission will conduct a meeting, telephone or video conference, or other procedures to address issues raised by its preliminary determination of inconsistency and comments thereon. The Commission will give at least 15 days' advance notice to each party, affected resource agency, or Indian tribe, which may participate in the meeting or conference. Any meeting, conference, or additional procedure to address these issues will be scheduled to take place within 90 days of the date the Commission issues a preliminary determination of inconsistency. The Commission will prepare a written summary of any meeting held under this paragraph to discuss section 10(j) issues, including any proposed resolutions and supporting analysis, and a copy of the summary will be sent to all parties, affected resource agencies, and Indian tribes.

(e) The section 10(j) process ends when the Commission issues an order granting or denying the license application in question. If, after attempting to resolve inconsistencies between the fish and wildlife recommendations of a fish and wildlife agency and the purposes and requirements of the Federal Power Act or other applicable law, the Commission does not adopt in whole or in part a fish and wildlife recommendation of a fish and wildlife agency, the Commission will publish the findings and statements required by section 10(j)(2) of the Federal Power Act.

§ 5.27 Amendment of application.

(a) *Procedures.* If an Applicant files an amendment to its application that would materially change the project's

proposed plans of development, as provided in § 4.35 of this chapter, an agency, Indian tribe, or member of the public may modify the recommendations or terms and conditions or prescriptions it previously submitted to the Commission pursuant to §§ 5.20–5.26. Such modified recommendations, terms and conditions, or prescriptions must be filed no later than the due date specified by the Commission for comments on the amendment.

(b) *Date of acceptance.* The date of acceptance of an amendment of application for an original license filed under this part is governed by the provisions of § 4.35 of this chapter.

(c) *New and subsequent licenses.* The requirements of § 4.35 of this chapter do not apply to an application for a new or subsequent license, except that the Commission will reissue a public notice of the application in accordance with the provisions of § 4.32(d)(2) of this chapter if a material amendment, as that term is used in § 4.35(f) of this chapter, is filed.

(d) *Deadline.* All amendments to an application for a new or subsequent license, including the final amendment, must be filed with the Commission and served on all competing applicants no later than the date specified in the notice issued under § 5.22.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61743, Oct. 30, 2003]

§ 5.28 Competing applications.

(a) *Site access for a competing applicant.* The provisions of § 16.5 of this chapter shall govern site access for a potential license application to be filed in competition with an application for a new or subsequent license by an existing licensee pursuant to this part, except that references in § 16.5 to the pre-filing consultation provisions in parts 4 and 16 of this chapter shall be construed in a manner compatible with the effective administration of this part.

(b) *Competing applications.* The provisions of § 4.36 of this chapter shall apply to competing applications for original, new, or subsequent licenses filed under this part.

(c) *New or subsequent license applications—final amendments; better adapted statement.* Where two or more mutually exclusive competing applications for new or subsequent license have been filed for the same project, the final amendment date and deadlines for complying with provisions of § 4.36(d)(2)(ii) and (iii) of this chapter established pursuant to the notice issued under § 5.22 will be the same for all such applications.

(d) *Rules of preference among competing applicants.* The Commission will select among competing applications according to the provisions of § 4.37 of this chapter.

[Order 2002, 68 FR 51121, Aug. 25, 2003; 68 FR 61743, Oct. 30, 2003]

§ 5.29 Other provisions.

(a) *Filing requirement.* Unless otherwise provided by statute, regulation or order, all filings in hydropower hearings, except those conducted by trial-type procedures, must conform to the requirements of 18 CFR part 385, subpart T of this chapter.

(b) *Waiver of compliance with consultation requirements.* (1) If an agency, Indian tribe, or member of the public waives in writing compliance with any consultation requirement of this part, an applicant does not have to comply with the requirement as to that agency, Indian tribe, or member of the public.

(2) If an agency, Indian tribe, member of the public fails to timely comply with a provision regarding a requirement of this section, an applicant may proceed to the next sequential requirement of this section without waiting for the agency, Indian tribe, or member of the public.

(c) *Requests for privileged treatment of pre-filing submission.* If a potential Applicant requests privileged treatment of any information submitted to the Commission during pre-filing consultation (except for the information specified in § 5.4), the Commission will treat the request in accordance with the provisions in § 388.112 of this chapter until the date the application is filed with the Commission.

(d) *Conditional applications.* Any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected.

(e) *Trial-type hearing.* The Commission may order a trial-type hearing on an application for a license under this part either upon its own motion or the motion of any interested party of record. Any trial-type hearing will be limited to the issues prescribed by order of the Commission. In all other cases, the hearings will be conducted by notice and comment procedures.

(f) *Notice and comment hearings.* (1) All comments and reply comments and all other filings described in this part must be served on all persons on the service list prepared by the Commission, in accordance with the requirements of §385.2010 of this chapter. If a party submits any written material to the Commission relating to the merits of an issue that may affect the responsibility of particular resource agency, the party must also serve a copy of the submission on that resource agency.

(2) The Director of Energy Projects may waive or modify any of the provisions of this part for good cause. A commenter or reply commenter may obtain an extension of time from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with §385.2008 of this chapter.

(3) Late-filed recommendations by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act and section 10(j) of the Federal Power Act for the protection, mitigation of damages to, and enhancement of fish and wildlife affected by the development, operation, and management of the proposed project and late-filed terms and conditions or prescriptions filed pursuant to sections 4(e) and 18 of the Federal Power Act, respectively, will be considered by Commission under section 10(a) of the Federal Power Act if such consideration would not delay or disrupt the proceeding.

(g) *Settlement negotiations.* (1) The Commission will consider, on a case-by-case basis, requests for a short suspension of the procedural schedule for the purpose of participants conducting settlement negotiations, where it determines that the suspension will not adversely affect timely action on a license application. In acting on such requests, the Commission will consider, among other things:

(i) Whether requests for suspension of the procedural schedule have previously been made or granted;

(ii) Whether the request is supported by a consensus of participants in the proceeding and an explanation of objections to the request expressed by any participant;

(iii) The likelihood that a settlement agreement will be filed within the requested suspension period; and

(iv) Whether the requested suspension is likely to cause any new or subsequent license to be issued after the expiration of the existing license.

(2) The Commission reserves the right to terminate any suspension of the procedural schedule if it concludes that insufficient progress is being made toward the filing of a settlement agreement.

(h) *License conditions and required findings.* (1) All licenses shall be issued on the conditions specified in Section 10 of the Federal Power Act and such other conditions as the Commission determines are lawful and in the public interest.

(2) Subject to paragraph (f)(3) of this section, fish and wildlife conditions shall be based on recommendations timely received from the fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act.

(3) The Commission will consider the timely recommendations of resource agencies, other governmental units, and members of the public, and the timely recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(4) Licenses for a project located within any Federal reservation shall be issued only after the findings required by, and subject to any conditions that may be timely filed pursuant to section 4(e) of the Federal Power Act.

(5) The Commission will require the construction, maintenance, and operation of such fishways as may be timely prescribed by the Secretary of Commerce or the Secretary of the Interior, as appropriate, pursuant to section 18 of the Federal Power Act.

(i) *Standards and factors for issuing a new license.* (1) In determining whether a final proposal for a new license under section 15 of the Federal Power Act is

best adapted to serve the public interest, the Commission will consider the factors enumerated in sections 15(a)(2) and (a)(3) of the Federal Power Act.

(2) If there are only insignificant differences between the final applications of an existing licensee and a competing Applicant after consideration of the factors enumerated in section 15(a)(2) of the Federal Power Act, the Commission will determine which Applicant will receive the license after considering:

(i) The existing licensee's record of compliance with the terms and conditions of the existing license; and

(ii) The actions taken by the existing licensee related to the project which affect the public.

(iii) An existing licensee that files an application for a new license in conjunction with an entity or entities that are not currently licensees of all or part of the project will not be considered an existing licensee for the purpose of the insignificant differences provision of section 15(a)(2) of the Federal Power Act.

(j) *Fees under section 30(e) of the Federal Power Act.* The requirements of 18 CFR part 4, subpart M, of this chapter, fees under section 30(e) of the Federal Power Act, apply to license applications developed under this part.

§ 5.30 Critical energy infrastructure information.

If any action required by this part requires a potential Applicant or Applicant to reveal Critical Energy Infrastructure Information, as defined by § 388.113(c) of this chapter, to the public, the Applicant must follow the procedures set out in § 4.32(k) of this chapter.

§ 5.31 Transition provision.

This part shall apply to license applications for which the deadline for filing a notification of intent to seek a new or subsequent license, or for filing a notification of intent to file an original license application, as required by § 5.5 of this part, is July 23, 2005 or later.

PART 6—SURRENDER OR TERMINATION OF LICENSE

Sec.

AUTHORITY: Secs. 6, 10(i), 13, 41 Stat. 1067, 1068, 1071, as amended, sec. 309, 49 Stat. 858; 16 U.S.C. 799, 803(i), 806, 825h; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.),* unless otherwise noted.

§ 6.1 Application for surrender.

Every application for surrender of a license shall state the reason therefor; and, except in the case of an application for surrender of a license for a minor project, or for a transmission line only, shall be executed by the licensee and filed in the same form and manner as the application for license, and shall be accompanied by the license and all amendments thereof. Public notice of such application shall be given at least 30 days prior to action upon the application.

(Secs. 308 and 309; 49 Stat. 858, 859 (16 U.S.C. 825g, 825h))

[Order No. 570, 42 FR 40191, Aug. 9, 1977]

CROSS REFERENCES: For application for license, general provisions, see §§ 4.30 to 4.33, inclusive, of this chapter. For application for license for proposed major project or minor part thereof, see §§ 4.40 to 4.42, inclusive, of this chapter. For application for license for constructed major project or minor part thereof, see §§ 4.50 and 4.51 of this chapter. For forms for application for licenses, see §§ 131.2 to 131.6, inclusive, of this chapter.

§ 6.2 Surrender of license.

Licenses may be surrendered only upon the fulfillment by the licensee of such obligations under the license as the Commission may prescribe, and, if the project works authorized under the license have been constructed in whole or in part, upon such conditions with respect to the disposition of such works as may be determined by the Commission. Where project works have been constructed on lands of the United States the licensee will be required to restore the lands to a condition satisfactory to the Department having supervision over such lands and

annual charges will continue until such restoration has been satisfactorily completed.

[Order 175, 19 FR 5217, Aug. 18, 1954]

§ 6.3 Termination of license.

Licenses may be terminated by written order of the Commission not less than 90 days after notice thereof shall have been mailed to the licensee by certified mail to the last address whereof the Commission has been notified by the licensee, if there is failure to commence actual construction of the project works within the time prescribed in the license, or as extended by the Commission. Upon like notice, the authority granted under a license with respect to any separable part of the project works may be terminated if there is failure to begin construction of such separable part within the time prescribed or as extended by the Commission.

(Administrative Procedure Act, 5 U.S.C. 551–557 (1976); Federal Power Act, as amended, 16 U.S.C. 291–628 (1976 & Supp. V 1981), Dept. of Energy Organization Act 42 U.S.C. 7101–7352 (Supp. V 1981); E.O. 12009, 3 CFR 142 (1978))

[Order 141, 12 FR 8491, Dec. 19, 1947, as amended by Order 344, 48 FR 49010, Oct. 24, 1983]

§ 6.4 Termination by implied surrender.

If any licensee holding a license subject to the provisions of section 10(i) of the Act shall cause or suffer essential project property to be removed or destroyed, or become unfit for use, without replacement, or shall abandon, or shall discontinue good faith operation of the project for a period of three years, the Commission will deem it to be the intent of the licensee to surrender the license; and not less than 90 days after public notice may in its discretion terminate the license.

[Order 141, 12 FR 8491, Dec. 19, 1947]

§ 6.5 Annual charges.

Annual charges arising under a license surrendered or terminated shall continue until the effective date set forth in the Commission's order with respect to such surrender or termination.

[Order 175, 19 FR 5217, Aug. 18, 1954]

CROSS REFERENCE: For annual charges, see part 11 of this chapter.

PART 8—RECREATIONAL OPPORTUNITIES AND DEVELOPMENT AT LICENSED PROJECTS

Sec.

AUTHORITY: 5 U.S.C. 551–557; 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

§ 8.1 Publication of license conditions relating to recreation.

Following the issuance or amendment of a license, the licensee shall make reasonable efforts to keep the public informed of the availability of project lands and waters for recreational purposes, and of the license conditions of interest to persons who may be interested in the recreational aspects of the project or who may wish to acquire lands in its vicinity. Such efforts shall include but not be limited to: the publication of notice in a local newspaper once each week for 4 weeks of the project's license conditions which relate to public access to and the use of the project waters and lands for recreational purposes, recreational plans, installation of recreation and fish and wildlife facilities, reservoir water surface elevations, minimum water releases or rates of change of water releases and such other conditions of general public interest as the Commission may designate in the order issuing or amending the license.

[Order 299, 30 FR 7313, June 3, 1965]

§ 8.2 Posting of project lands as to recreational use and availability of information.

(a) Following the issuance or amendment of a license, the licensee shall post and shall maintain at all points of public access which are required by the license (or at such access points as are specifically designated for this purpose by the licensee) and at such other

points as are subsequently prescribed by the Commission on its own motion or upon the recommendation of a public recreation agency operating in the area in which the project is located, a conspicuous sign giving the name of the project and the owner of the project, a statement that it is licensed by the Commission and the project number, directions to the areas of the project which are available for public recreation use, permissible times and activities, and other regulations regarding such use, and advising that further information may be obtained at local offices of the licensee in the vicinity of the project. In addition, the licensee shall post at such locations conspicuous notice that the recreation facilities are open to all members of the public without discrimination.

(b) The licensee shall make available for inspection at its local offices in the vicinity of the project the recreation plan approved by the Commission and the entire license instrument, properly indexed for easy reference to the license conditions designated for publications in § 8.1.

[Order 299, 30 FR 7313, June 3, 1965, as amended by Order 341, 32 FR 6488, Apr. 27, 1967; 32 FR 11640, Aug. 11, 1967]

§ 8.3 Discrimination prohibited.

Every licensee maintaining recreation facilities for the use of the public at a licensed project, or employing or permitting any other person to maintain such facilities, shall permit, or require such other person to permit, equal and unobstructed use of such facilities to all members of the public without regard to race, color, religious creed or national origin.

[Order 341, 32 FR 6488, Apr. 27, 1967]

§ 8.11 Information respecting use and development of public recreational opportunities.

(a) *Applicability.* (1) Except as provided in paragraph (b) of this section, each licensee of a project under major or minor Commission license shall prepare with respect to each development within such project an original and two conformed copies of FERC Form No. 80 prescribed by § 141.14 of this chapter and submit them to a Commission Regional Office pursuant to the requirements in the General Information portion of the form.

(2) FERC Form No. 80 is due on April 1, 1991, for data compiled during the calendar year ending December 31, 1990. Thereafter, FERC Form No. 80 is due on April 1 of every sixth year for data compiled during the previous calendar year.

(3) The Form No. 80 shall be completed in its entirety for each initial filing of the report. Filings of Form No. 80 made subsequent to an initial filing of the report shall be completed only to the extent necessary to change, delete or add to the information supplied in a previously-filed form.

(4) A copy of the Form No. 80 should be retained by the respondent licensee in its file.

(b) *Initial Form No. 80 filings.* Each licensee of an unconstructed project shall file an initial Form No. 80 after such project has been in operation for a full calendar year prior to the filing deadline. Each licensee of an existing (constructed) project shall file an initial Form No. 80 after such project has been licensed for a full calendar year prior to the filing deadline.

(c) *Exemptions.* A licensee who has filed a Form No. 80 may request an exemption from any further filing of the form for any development that has no existing or potential recreational use or only a minor existing or potential recreational use (as indicated by fewer than 100 recreation days of use during the previous calendar year) by submitting a statement not later than 6 months prior to the due date for the next filing, stating that Form No. 80 has been filed previously for such development and setting out the basis for believing that the development has no existing or potential recreational use or a minor existing or potential recreational use.

(Approved by the Office of Management and Budget under control number 1902–0106)

[46 FR 50059, Oct. 9, 1981, as amended by 49 FR 5073, Feb. 10, 1984; Order 419, 50 FR 20096, May 14, 1985; Order 540, 57 FR 21737, May 22, 1992]

PART 9—TRANSFER OF LICENSE OR LEASE OF PROJECT PROPERTY

APPLICATION FOR TRANSFER OF LICENSE

APPLICATION FOR LEASE OF PROJECT PROPERTY

AUTHORITY: Sec. 8, 41 Stat. 1068, sec. 309, 49 Stat. 858; 16 U.S.C. 801, 825h; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.)*

CROSS REFERENCE: For application for approval of transfer of license, see §131.20 of this chapter.

APPLICATION FOR TRANSFER OF LICENSE

§9.1 Filing.

Any licensee desiring to transfer a license or rights thereunder granted, and the person, association, corporation, State, or municipality desiring to acquire the same, shall jointly or severally file an application for approval of such transfer and acquisition. Such application shall be verified, shall conform to §131.20 of this chapter, and shall be filed in accordance with §4.32 of this chapter.

[Order 501, 39 FR 2267, Jan. 18, 1974, as amended by Order 2002, 68 FR 51139, Aug. 25, 2003]

§9.2 Contents of application.

Every application for approval of such transfer and acquisition by the proposed transferee shall set forth in appropriate detail the qualifications of the transferee to hold such license and to operate the property under license, which qualifications shall be the same as those required of applicants for license.

[Order 141, 12 FR 8491, Dec. 19, 1947]

CROSS REFERENCES: For administrative rules relating to applicants for license, see part 385 of this chapter. For regulations as to licenses and permits, see part 4 of this chapter.

§9.3 Transfer.

(a) Approval by the Commission of transfer of a license is contingent upon the transfer of title to the properties under license, delivery of all license instruments, and a showing that such transfer is in the public interest. The transferee shall be subject to all the conditions of the license and to all the provisions and conditions of the act, as though such transferee were the original licensee and shall be responsible for the payment of annual charges which accrue prior to the date of transfer.

(b) When the Commission shall have approved the transfer of the license, its order of approval shall be forwarded to the transferee for acknowledgment of acceptance. Unless application for rehearing is filed, or unless the order is stayed by the Commission, the order shall become final thirty (30) days from date of issuance and the acknowledgment of acceptance shall be filed in triplicate with the Commission within sixty (60) days from date of issuance accompanied by a certified copy of the deed of conveyance or other instrument evidencing transfer of the property under license, together with evidence of the recording thereof.

[Order 175, 19 FR 5217, Aug. 18, 1954]

APPLICATION FOR LEASE OF PROJECT PROPERTY

§9.10 Filing.

Any licensee desiring to lease the project property covered by a license or any part thereof, whereby the lessee is granted the exclusive occupancy, possession, or use of project works for purposes of generating, transmitting, or distributing power, and the person, association, or corporation, State, or municipality desiring to acquire such project property by lease, shall file as many copies of such proposed lease together with as many copies of the application as required in accordance with §4.32(b)(1) of this chapter. Such application and action thereon by the Commission will, in general, be subject to the provisions of §§9.1 through 9.3.

[Order 501, 39 FR 2267, Jan. 18, 1974, as amended by Order 2002, 68 FR 51139, Aug. 25, 2003]

PART 11—ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

Subpart A—Charges for Costs of Administration, Use of Tribal Lands and Other Government Lands, and Use of Government Dams

Subpart B—Charges for Headwater Benefits

Subpart C—General Procedures

AUTHORITY: 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

Subpart A—Charges for Costs of Administration, Use of Tribal Lands and Other Government Lands, and Use of Government Dams

§ 11.1 Costs of administration.

(a) *Authority.* Pursuant to section 10(e) of the Federal Power Act and section 3401 of the Omnibus Budget Reconciliation Act of 1986, the Commission will assess reasonable annual charges against licensees and exemptees to reimburse the United States for the costs of administration of the Commission's hydropower regulatory program.

(b) *Scope.* The annual charges under this section will be charged to and allocated among:

(1) All licensees of projects of more than 1.5 megawatts of installed capacity; and

(2) All holders of exemptions under either section 30 of the Federal Power Act or sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, as amended by section 408 of the Energy Security Act of 1980, but only if the exemption was issued subsequent to April 21, 1995 and is for a project of more than 1.5 megawatts of installed capacity.

(3) If the exemption for a project of more than 1.5 megawatts of installed capacity was issued subsequent to April 21, 1995 but pursuant to an application filed prior to that date, the exemptee may credit against its annual charge any filing fee paid pursuant to §381.601 of this chapter, which was removed effective April 21, 1995, 18 CFR 381.601 (1994), until the total of all such credits equals the filing fee that was paid.

(c) *Licenses and exemptions other than State or municipal.* For licensees and exemptees, other than State or municipal:

(1) A determination shall be made for each fiscal year of the costs of administration of Part I of the Federal Power Act chargeable to such licensees or exemptees, from which shall be deducted any administrative costs that are stated in the license or exemption or fixed by the Commission in determining headwater benefit payments.

(2) For each fiscal year the costs of administration determined under paragraph (c)(1) of this section will be assessed against such licenses or exemptee in the proportion that the annual charge factor for each such project bears to the total of the annual charge factors under all such outstanding licenses and exemptions.

(3) The annual charge factor for each such project shall be found as follows:

(i) For a conventional project the factor is its authorized installed capacity plus 112.5 times its annual energy output in millions of kilowatt-hours.

(ii) For a pure pumped storage project the factor is its authorized installed capacity.

(iii) For a mixed conventional-pumped storage project the factor is its authorized installed capacity plus 112.5 times its gross annual energy output in millions of kilowatt-hours less 75 times the annual energy used for pumped storage pumping in million of kilowatt-hours.

(iv) For purposes of determining their annual charges factor, projects that are operated pursuant to an exemption will be deemed to have an annual energy output of zero.

(4) To enable the Commission to determine such charges annually, each licensee whose authorized installed capacity exceeds 1.5 megawatts must file with the Commission, on or before November 1 of each year, a statement under oath showing the gross amount of power generated (or produced by nonelectrical equipment) and the amount of power used for pumped storage pumping by the project during the preceding fiscal year, expressed in kilowatt hours. If any licensee does not report the gross energy output of its project within the time specified above, the Commission's staff will estimate the energy output and this estimate may be used in lieu of the filings required by this section made by such licensee after November 1.

(5) For unconstructed projects, the assessments start on the date of commencement of project construction. For constructed projects, the assessments start on the effective date of the license or exemption, except for any new capacity authorized therein. The assessments for new authorized capacity start on the date of commencement of construction of such new capacity. In the event that construction commences during a fiscal year, the charges will be prorated based on the date on which construction commenced.

(d) *State and municipal licensees and exemptees.* For State or municipal licensees and exemptees:

(1) A determination shall be made for each fiscal year of the cost of administration under Part I of the Federal Power Act chargeable to such licensees and exemptees, from which shall be deducted any administrative costs that are stated in the license or exemption or that are fixed by the Commission in determining headwater benefit payments.

(2) An exemption will be granted to a licensee or exemptee to the extent, if any, to which it may be entitled under section 10(e) of the Act provided the data is submitted as requested in paragraphs (d) (4) and (5) of this section.

(3) For each fiscal year the total actual cost of administration as determined under paragraph (d)(1) of this section will be assessed against each such licensee or exemptee (except to the extent of the exemptions granted pursuant to paragraph (d)(2) of this section) in the proportion that the authorized installed capacity of each such project bears to the total such capacity under all such outstanding licenses or exemptions.

(4) To enable the Commission to compute on the bill for annual charges the exemption to which State and municipal licensees and exemptees are entitled because of the use of power by the licensee or exemptee for State or municipal purposes, each such licensee or exemptee must file with the Commission, on or before November 1 of each year, a statement under oath showing the following information with respect to the power generated by the project and the disposition thereof during the preceding fiscal year, expressed in kilowatt-hours:

(i) Gross amount of power generated by the project.

(ii) Amount of power used for station purposes and lost in transmission, etc.

(iii) Net amount of power available for sale or use by licensee or exemptee, classified as follows:

(A) Used by licensee or exemptee.

(B) Sold by licensee or exemptee.

(5) When the power from a licensed or exempted project owned by a State or municipality enters into its electric system, making it impracticable to meet the requirements of this section with respect to the disposition of project power, such licensee or exemptee may, in lieu thereof, furnish similar information with respect to the disposition of the available power of the entire electric system of the licensee or exemptee.

(6) The assessments commence on the date of commencement of project operation. In the event that project operation commences during a fiscal year, the charges will be prorated based on the date on which operation commenced.

(e) *Transmission lines.* For projects involving transmission lines only, the administrative charge will be stated in the license.

(f) *Maximum charge.* No licensed or exempted project's annual charge may exceed a maximum charge established each year by the Commission to equal 2.0 percent of the adjusted Commission costs of administration of the hydropower regulatory program. For every project with an annual charge determined to be above the maximum charge, that project's annual charge will be set at the maximum charge, and any amount above the maximum charge will be reapportioned to the remaining projects. The reapportionment will be computed using the method outlined in paragraphs (c) and (d) of this section (but excluding any project whose annual charge is already set at the maximum amount). This procedure will be repeated until no project's annual charge exceeds the maximum charge.

(g) *Commission's costs.* (1) With respect to costs incurred by the Commission, the assessment of annual charges will be based on an estimate of the costs of administration of Part I of the Federal Power Act that will be incurred during the fiscal year in which the annual charges are assessed. After the end of the fiscal year, the assessment will be recalculated based on the costs of administration that were actually incurred during that fiscal year; the actual costs will be compared to the estimated costs; and the difference between the actual and estimated costs will be carried over as an adjustment to the assessment for the subsequent fiscal year.

(2) The issuance of bills based on the administrative costs incurred by the Commission during the year in which the bill is issued will commence in 1993. The annual charge for the administrative costs that were incurred in fiscal year 1992 will be billed in 1994. At the licensee's option, the charge may be paid in three equal annual installments in fiscal years 1994, 1995, and 1996, plus any accrued interest. If the licensee elects the three-year installment plan, the Commission will accrue interest (at the most recent yield of two-year Treasury securities) on the unpaid charges and add the accrued interest to the installments billed in fiscal years 1995 and 1996.

(h) In making their annual reports to the Commission on their costs in administering Part I of the Federal Power Act, the United States Fish and Wildlife Service and the National Marine Fisheries Service are to deduct any amounts that were deposited into their Treasury accounts during that year as reimbursements for conducting studies and reviews pursuant to section 30(e) of the Federal Power Act.

(i) *Definition.* As used in paragraphs (c) and (d) of this section, *authorized installed capacity* means the lesser of the ratings of the generator or turbine units. The rating of a generator is the product of the continuous-load capacity rating of the generator in kilovolt-amperes (kVA) and the system power factor in kW/kVA. If the licensee or exemptee does not know its power factor, a factor of 1.0 kW/kVA will be used. The rating of a turbine is the product of the turbine's capacity in horsepower (hp) at best gate (maximum efficiency point) opening under the manufacturer's rated head times a conversion factor of 0.75 kW/hp. If the generator or turbine installed has a rating different from that authorized in the license or exemption, or the installed generator is rewound or otherwise modified to change its rating, or the turbine is modified to change its rating, the licensee or exemptee must apply to the Commission to amend its authorized installed capacity to reflect the change.

(j) *Transition.* For a license having the capacity of the project for annual charge purposes stated in horsepower, that capacity shall be deemed to be the capacity stated in kilowatts elsewhere in the license, including any amendments thereto.

[60 FR 15047, Mar. 22, 1995, as amended by Order 584, 60 FR 57925, Nov. 24, 1995]

§ 11.2 Use of government lands.

(a) Reasonable annual charges for recompensing the United States for the use, occupancy, and enjoyment of its lands (other than lands adjoining or pertaining to Government dams or other structures owned by the United States Government) or its other property, will be fixed by the Commission. In fixing such charges the Commission may take into consideration such factors as commercial value, the most profitable use for which the lands or other property may be suited, the beneficial purpose for which said lands or other property have been or may be used, and such other factors as the Commission may deem pertinent.

(b) Pending further order of the Commission and subject to adjustments as conditions may warrant, annual charges for the use of government lands will be payable in advance, and will be set on the basis of the schedule of rental fees for linear rights-of-way as set out in Appendix A of this part. Annual charges for transmission line rights-of-way will be equal to the per-acre charges established by the above schedule. Annual charges for other project lands will be equal to twice the charges established by the schedule. The Commission, by its designee the Executive Director, will update its fees schedule to reflect changes in land values established by the Forest Service. The Executive Director will publish the updated fee schedule in the FEDERAL REGISTER.

(c)(1) The annual land use charge payable for the nine month transition year of the implementation of this rule (1987) will be payable in three equal installments, with an installment included in the land use charges bills for 1988, 1989, and 1990.

(2) The charge for one year will equal an amount as computed under the procedures outlined in this section, or twice the previous full normal year's bill (not including the installments described in paragraph (c)(1) of this section), whichever is less.

(d) The minimum annual charge for use of Government lands under any license will be $25.

(e) No licensee under a license issued prior to August 26, 1935, shall be required to pay annual charges in an amount greater than that prescribed in such license, except as may be otherwise provided in the license.

[Order 560, 42 FR 1229, Jan. 6, 1977; 42 FR 6366, Feb. 2, 1977. Redesignated at 51 FR 24318, July 3, 1986; Order No. 469, 52 FR 18209, May 14, 1987; 53 FR 44859, Nov. 7, 1988]

§ 11.3 Use of government dams, excluding pumped storage projects.

(a) *General rule.* (1) Any licensee whose non-Federal project uses a Government dam or other structure for electric power generation and whose annual charges are not already specified in final form in the license must pay the United States an annual charge for the use of that dam or other structure as determined in accordance with this section. Payment of such annual charge is in addition to any reimbursement paid by a licensee for costs incurred by the United States as a direct result of the licensee's project development at such Government dam.

(2) Any licensee that is obligated under the terms of a license issued on or before September 16, 1986 to pay specified annual charges for the use of a Government dam must continue to pay the annual charges prescribed in the project license pending any readjustment of the annual charge for the project made pursuant to section 10(e) of the Federal Power Act.

(b) *Graduated flat rates.* Annual charges for the use of Government dams or other structures owned by the United States are 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours.

(c) *Information reporting.* (1) Except as provided in paragraph (c)(2) of this section, each licensee must file with the Commission, on or before November 1 of each year, a sworn statement showing the gross amount of energy generated during the preceding fiscal year and the amount of energy provided free of charge to the Government. The determination of the annual charge will be based on the gross energy production less the energy provided free of charge to the Government.

(2) A licensee who has filed these data under another section of part 11 or who has submitted identical data with FERC or the Energy Information Administration for the same fiscal year is not required to file the information described in paragraph (c)(1) of this section. Referenced filings should be identified by company name, date filed, docket or project number, and form, number.

(d) *Credits.* A licensee may file a request with the Director of the Office of Energy Projects for a credit for contractual payments made for construction, operation, and maintenance of a Government dam at any time before 30 days after receiving a billing for annual charges determined under this section. The Director, or his designee, will grant such a credit only when the licensee demonstrates that a credit is reasonably justified. The Director, or his designee, shall consider, among other factors, the contractual arrangements between the licensee and the Federal agency which owns the dam and whether these arrangements reveal clearly that substantial payments are being made for power purposes, relevant legislation, and other equitable factors.

[Order 379, 49 FR 22778, June 1, 1984, as amended by Order 379–A, 49 FR 33862, Aug. 27, 1984. Redesignated at 51 FR 24318, July 3, 1986; Order No. 469, 52 FR 18209, May 14, 1987; 52 FR 33802, Sept. 8, 1987; 53 FR 44859, Nov. 7, 1988; Order 647, 69 FR 32438, June 10, 2004]

§ 11.4 Use of government dams for pumped storage projects, and use of tribal lands.

(a) *General Rule.* The Commission will determine on a case-by-case basis under section 10(e) of the Federal Power Act the annual charges for any pumped storage project using a Government dam or other structure and for any project using tribal lands within Indian reservations.

(b) *Information reporting.* (1) Except as provided in paragraph (b)(2) of this section a Licensee whose project includes pumped storage facilities must file with the Commission, on or before November 1 of each year, a sworn statement showing the gross amount of energy generated during the preceding fiscal year, and the amount of energy provided free of charge to the Government, and the amount of energy used for pumped storage pumping.

(2) A licensee who has filed these data under another section of part 11 or who has submitted identical data with FERC or the Energy Information Administration for the same fiscal year is not required to file the information required in paragraph (b)(1) of this section. Referenced filings should be identified by company name, date filed, docket or project number, and form number.

(c) Commencing in 1993, the annual charges for any project using tribal land within Indian reservations will be billed during the fiscal year in which the land is used, for the use of that land during that year.

[Order 379, 49 FR 22778, June 1, 1984. Redesignated at 51 FR 24318, July 3, 1986; Order 469, 52 FR 18209, May 14, 1987; 52 FR 33802, Sept. 8, 1987; Order 551, 58 FR 15770, Mar. 24, 1993]

§ 11.5 Exemption of minor projects.

No exemption will be made from payment of annual charges for the use of Government dams or tribal lands within Indian reservations but licenses may be issued without charges other than for such use for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in minor projects.

[Order 141, 12 FR 8492, Dec. 19, 1947. Redesignated by Order 379, 49 FR 22778, June 1, 1984. Redesignated at 51 FR 24318, July 3, 1986]

§ 11.6 Exemption of State and municipal licensees and exemptees.

(a) *Bases for exemption.* A State or municipal licensee or exemptee may claim total or partial exemption from the assessment of annual charges upon one or more of the following grounds:

(1) The project was primarily designed to provide or improve navigation;

(2) To the extent that power generated, transmitted, or distributed by the project was sold directly or indirectly to the public (ultimate consumer) without profit;

(3) To the extent that power generated, transmitted, or distributed by the project was used by the licensee for State or municipal purposes.

(b) *Projects primarily for navigation.* No State or municipal licensee shall be entitled to exemption from the payment of annual charges on the ground that the project was primarily designed to provide or improve navigation unless the licensee establishes that fact from the actual conditions under which the project was constructed and was operated during the calendar year for which the charge is made.

(c) *State or municipal use.* A State or municipal licensee shall be entitled to exemption from the payment of annual charges for the project to the extent that power generated, transmitted, or distributed by the project is used by the licensee itself for State or municipal purposes, such as lighting streets, highways, parks, public buildings, etc., for operating licensee's water or sewerage system, or in performing other public functions of the licensee.

(d) *Sales to public.* No State or municipal licensee shall be entitled to exemption from the payment of annual charges on the ground that power generated, transmitted, or distributed by the project is sold to the public without profit, unless such licensee shall show:

(1) That it maintains an accounting system which segregates the operations of the licensed project and reflects with reasonable accuracy the revenues and expenses of the project;

(2) That an income statement, prepared in accordance with the Commission's Uniform System of Accounts, shows that the revenues from the sale of project power do not exceed the total amount of operating expenses, maintenance, depreciation, amortization, taxes, and interest on indebtedness, applicable to the project property. Periodic accruals or payments for redemption of the principal of bonds or other indebtedness may not be deducted in determining the net profit of the project.

(e) *Sales for resale.* Notwithstanding compliance by a State or municipal licensee with the requirements of paragraph (d) of this section, it shall be subject to the payment of annual charges to the extent that electric power generated, transmitted, or distributed by the project is sold to another State, municipality, person, or corporation for resale, unless the licensee shall show that the power was sold to the ultimate consumer without profit. The matter of whether or not a profit was made is a question of fact to be established by the licensee.

(f) *Interchange of power.* Notwithstanding compliance by a State or municipal licensee with the requirements of paragraph (d) of this section, it shall be subject to the payment of annual charges to the extent that power generated, transmitted, or distributed by the project was supplied under an interchange agreement to a State, municipality, person, or corporation for sale at a profit (which power was not offset by an equivalent amount of power received under such interchange agreement) unless the licensee shall show that the power was sold to ultimate consumers without profit.

(g) *Construction period.* During the period when the licensed project is under construction and is not generating power, it will be considered as operating without profit within the meaning of this section, and licensee will be entitled to total exemption from the payment of annual charges, except as to those charges relating to the use of a Government dam or tribal lands within Indian reservations.

(h) *Optional showing.* When the power from the licensed project enters into the electric power system of the State or municipal licensee, making it impracticable to meet the requirements set forth in this section with respect to the operations of the project only, such licensee may, in lieu thereof, furnish the same information with respect to the operations of said electric power system as a whole.

(i) *Application for exemption.* Applications for exemption from payment of annual charges shall be signed by an authorized executive officer or chief accounting officer of the licensee or exemptee and verified under oath. An original and three copies of such application shall be filed with the Commission within the time allowed (by §11.28) for the payment of the annual charges. If the licensee or exemptee, within the time allowed for the payment of the annual charges, files notice that it intends to file an application for exemption, an additional period of 30 days is

allowed within which to complete and file the application for exemption. The filing of an application for exemption does not by itself alleviate the requirement to pay the annual charges, nor does it exonerate the licensee or exemptee from the assessment of penalties under §11.21. If a bill for annual charges becomes payable after an application for an exemption has been filed and while the application is still pending for decision, the bill may be paid under protest and subject to refund.

[Order 143, 13 FR 6681, Nov. 13, 1948. Redesignated and amended by Order 379, 49 FR 22778, June 1, 1984. Redesignated at 51 FR 24318, July 3, 1986; 60 FR 15048, Mar. 22, 1995]

§ 11.7 Effective date.

All annual charges imposed under this subpart will be computed beginning on the effective date of the license unless some other date is fixed in the license.

[51 FR 24318, July 3, 1986]

§ 11.8 Adjustment of annual charges.

All annual charges imposed under this subpart continue in effect as fixed unless changed as authorized by law.

[51 FR 24318, July 3, 1986]

Subpart B—Charges for Headwater Benefits

SOURCE: Order 453, 51 FR 24318, July 3, 1986, unless otherwise noted.

§ 11.10 General provision; waiver and exemptions; definitions.

(a) *Headwater benefits charges.* (1) The Commission will assess or approve charges under this subpart for direct benefits derived from headwater projects constructed by the United States, a licensee, or a pre-1920 permittee. Charges under this subpart will amount to an equitable part of the annual costs of interest, maintenance, and depreciation expenses of such headwater projects and the costs to the Commission of determining headwater benefits charges. Except as provided in paragraph (b) of this section, the owner of any non-Federal downstream project that receives headwater benefits must pay charges determined under this subpart.

(2) Headwater benefits are the additional electric generation at a downstream project that results from regulation of the flow of the river by the headwater, or upstream, project, usually by increasing or decreasing the release of water from a storage reservoir.

(b) *Waiver and exemptions.* The owner of a downstream project with installed generating capacity of 1.5 MW (2000 horsepower) or less or for which the Commission has granted an exemption from section 10(f) is not required to pay headwater benefits charges.

(c) *Definitions.* For purposes of this subpart:

(1) *Energy gains* means the difference between the number of kilowatt-hours of energy produced at a downstream project with the headwater project and that which would be produced without the headwater project.

(2) *Generation* means gross generation of electricity at a hydroelectric project, including generation needed for station use or the equivalent for direct drive units, measured in kilowatt-hours. It does not include energy used for or derived from pumping in a pumped storage facility.

(3) *Headwater project costs* means the total costs of an upstream project constructed by the United States, a licensee, or pre-1920 permittee.

(4) *Separable cost* means the difference between the cost of a multiple-function headwater project with and without any particular function.

(5) *Remaining benefits* means the difference between the separable cost of a specific function in a multiple-function project and the lesser or:

(i) The benefits of that function in the project, as determined by the responsible Federal agency at the time the project or function was authorized; or

(ii) The cost of the most likely alternative single-function project providing the same benefits.

(6) *Joint-use cost* means the difference between the total project cost and the total separable costs. Joint-use costs are allocated among the project functions according to each function's percentage of the total remaining benefits.

(7) *Specific power cost* means that portion of the headwater project costs that is directly attributable to the function of power generation at the headwater project, including, but not limited to, the cost of the electric generators, turbines, penstocks, and substation.

(8) *Joint-use power cost* means the portion of the joint-use cost allocated to the power function of the project.

(9) *Section 10(f) costs* means the annual interest, depreciation, and maintenance expense portion of the joint-use power cost, including costs of non-power functions required by statute to be paid by revenues from the power function.

(10) *Party* means:

(i) The owner of a non-Federal downstream hydroelectric project which is directly benefited by a headwater project constructed by the United States, a licensee, or a pre-1920 permittee;

(ii) The owner of a headwater project constructed by the United States, a licensee, or a pre-1920 permittee;

(iii) An operating agency of, or an agency marketing power from, a headwater project constructed by the United States; or

(iv) Any party, as defined in §385.102(c) of this chapter.

(11) *Final charge* means a charge assessed on an annual basis to recover section 10(f) costs and which represents the final determination of the charge for the period for which headwater benefits are assessed. Final charges may be established retroactively, to finalize an interim charge, or prospectively.

(12) *Interim charge* means a charge assessed to recover section 10(f) costs for a specified period of headwater benefits pending determination of a final charge for that period.

(13) *Investment cost* means the sum of:

(i) Project construction costs, including cost of land, labor and materials, cost of pre- and post-authorization investigations, and cost of engineering, supervision, and administration during construction of the project; and

(ii) Interest during construction.

§11.11 Energy gains method of determining headwater benefits charges.

(a) *Applicability*. This section applies to any determination of headwater benefits charges, unless:

(1) The Commission has approved headwater benefits charges pursuant to an existing coordination agreement among the parties;

(2) The parties reach, and the Commission approves, a settlement with respect to headwater benefits charges, pursuant to §11.14(a) of this subpart; or

(3) Charges may be assessed under §11.14(b).

(b) *General rule*—(1) *Summary*. Except as provided in paragraph (b)(3) of this section, a headwater benefits charge for a downstream project is determined under this subpart by apportioning the section 10(f) costs of the headwater project among the headwater project and all downstream projects that are not exempt from or waived from headwater benefits charges under §11.10(b) of this chapter, according to each project's share of the total energy benefits to those projects resulting from the headwater project.

(2) *Calculation; headwater benefits formula*. The annual headwater benefits charge for a downstream project is derived by multiplying the section 10(f) cost by the ratio of the energy gains received by the downstream project to the sum of total energy gains received by all downstream projects (except those projects specified in §11.10(b) of this chapter) plus the energy generated at the headwater project that is assigned to the joint-use power cost, as follows:

$$P = C_p \times \frac{E_n}{E_j + E_d}$$

In which:

P=annual payment to be made for headwater benefits received by a downstream project,

C_p=annual section 10(f) cost of the headwater project,

E_n=annual energy gains received at a downstream project, or group of projects if owned by one entity,

E_d=annual energy gains received at all downstream projects (except those specified in §11.10(b) of this chapter), and

E_j=portion of the annual energy generated at the headwater project assigned to the joint-use power cost.

(3) If power generation is not a function of the headwater project, section 10(f) costs will be apportioned only among the downstream projects.

(4) If the headwater project is constructed after the downstream project, liability for headwater benefits charges will accrue beginning on the day on which any energy losses at the downstream project due to filling the headwater reservoir have been offset by subsequent energy gains. If the headwater project is constructed prior to the downstream project, liability for headwater benefits charges will accrue beginning on the day on which benefits are first realized by the downstream project.

(5) No final charge assessed by the Commission under this subpart may exceed 85 percent of the value of the energy gains. If a party demonstrates, within the time specified in §11.17(b)(3) for response to a preliminary assessment, that any final charge assessed under this subpart, not including the cost of the investigation assessed under §11.17(c), exceeds 85 percent of the value of the energy gains provided to the downstream project for the period for which the charge is assessed, the Commission will reduce the charge to not more than 85 percent of the value. For purposes of this paragraph, the *value of the energy gains* is the cost of obtaining an equivalent amount of electricity from the most likely alternative source during the period for which the charge is assessed.

§11.12 Determination of section 10(f) costs.

(a) *for non-Federal headwater projects.* If the headwater project was constructed by a licensee or pre-1920 permittee and a party requests the Commission to determine charges, the Commission will determine on a case-by-case basis what portion of the annual interest, maintenance, and depreciation costs of the headwater project constitutes the section 10(f) costs, for purposes of this subpart.

(b) *For Federal headwater projects.* (1) If the headwater project was constructed or is operated by the United States, and the Commission has not approved a settlement between the downstream project owner and the headwater project owner, the section 10(f) cost will be determined by deriving, from information provided by the headwater project owner pursuant to §11.16 of this subpart, the joint-use power cost and the portion of the annual joint-use power cost that represents the interest, maintenance, and depreciation costs of the project.

(2) If power is not an authorized function of the headwater project, the section 10(f) cost is the annual interest, maintenance, and depreciation portion of the headwater project costs designated as the joint-use power cost, derived by deeming a power function at the project. The value of the benefits assigned to the deemed power function, for purposes of determining the value of remaining benefits of the joint-use power cost, is the total value of downstream energy gains included in the headwater benefits formula.

(3) For purposes of this paragraph, *total value of downstream energy gains* means the lesser of:

(i) The cost of generating an equivalent amount of electricity at the most likely alternative facility at the time the headwater project became operational; or

(ii) The incremental cost of installing electrical generation at the headwater project at the time the project became operational.

§11.13 Energy gains calculations.

(a) *Energy gains at a downstream project.* (1) Energy gains at a downstream project are determined by simulating operation of the downstream project with and without the effects of the headwater project. Except for determinations which are not complex or in which headwater benefits are expected to be small, calculations will be made by application of the Headwater Benefits Energy Gains Model, as presented in *The Headwater Benefits Energy Gains (HWBEG) Model Description and Users Manual,* which is available for the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

(2) If more than one headwater project provide energy gains to a downstream project, the energy gains at the downstream project are attributed to the headwater projects according to

the time sequence of commencement of operation in which each headwater project provided energy gains at the downstream project, by:

(i) Crediting the headwater project that is first in time with the amount of energy gains that it provided to the downstream project prior to operation of the headwater project that is next in time; and

(ii) Crediting any subsequent headwater project with the additional increment of energy gains provided by it to the downstream project.

(3) Annual energy losses at a downstream project, or group of projects owned by the same entity, that are attributable to the headwater project will be subtracted from energy gains for the same annual period at the downstream project or group of projects. A net loss in one calendar year will be subtracted from net gains in subsequent years until no net loss remains.

(b) *Energy generated at the headwater project.* (1) Except as provided in paragraphs (b)(2) and (b)(3) of this section, the portion of the total annual energy generation at the headwater project that is to be attributed to the joint-use power cost is derived by multiplying the total annual generation at the headwater project and the ratio of the project investment cost assigned to the joint-use power cost to the sum of the investment cost assigned to both the specific power cost and the joint-use power cost of the headwater project, as follows:

$$E_j = E \times \frac{C_j}{C_s + C_j}$$

In which:

E_j=annual energy generated at the headwater project to be attributed to the joint-use power cost,

E=total annual generation at the headwater project,

C_j=project investment costs assigned to the joint-use power cost, and

C_s=project investment costs assigned to specific power costs.

(2) If the headwater project contains a pumped storage facility, calculation of the portion of the total annual energy generation at the headwater project that is attributable to the joint-use power cost will be determined on a case-by-case basis.

(3) If no power is generated at the headwater project, the amount of energy attributable to the joint-use power cost under this section is the total of all downstream energy gains included in the headwater benefits formula.

§ 11.14 Procedures for establishing charges without an energy gains investigation.

(a) *Settlements.* (1) Owners of downstream and headwater projects subject to this subpart may negotiate a settlement for headwater benefits charges. Settlements must be filed with the Commission for its approval, according to the provisions of § 385.602.

(2) If the headwater project is a Federal project, any settlement under this section must result in headwater benefits payments that approximate those that would result under the energy gains method.

(b) *Continuation of previous headwater benefits determinations.* (1) For any downstream project being assessed headwater benefit charges on or before September 16, 1986, the Commission will continue to assess charges to that project on the same basis until changes occur in the river basin, including hydrology or project development, that affect headwater benefits.

(2) Any procedures that apply to § 11.17(b)(5) of this subpart will apply to any prospectively fixed charges that are continued under this paragraph.

§ 11.15 Procedures for determining charges by energy gains investigation.

(a) *Purpose of investigations; limitation.* Except as permitted under § 11.14, the Commission will conduct an investigation to obtain information for establishing headwater benefits charges under this subpart. The Commission will investigate and determine charges for a project downstream from a non-Federal headwater project only if the parties are unable to agree to a settlement and one of the parties requests the Commission to determine charges.

(b) *Notification.* The Commission will notify each downstream project owner and each headwater project owner

when it initiates an investigation under this section, and the period of project operations to be studied will be specified. An investigation will continue until a final charge has been established for all years studied in the investigation.

(c) *Jurisdictional objections.* If any project owner wishes to object to the assessment of a headwater benefits charge on jurisdictional grounds, such objection must:

(1) Be raised within 30 days after the notice of the investigation is issued; and

(2) State in detail the grounds for its objection.

(d) *Investigations.* (1) For any downstream project for which a final charge pursuant to an investigation has never been established, the Commission will conduct an initial investigation to determine a final charge.

(2) The Commission may, for good cause shown by a party or on its own motion, initiate a new investigation of a river basin to determine whether, because of any change in the hydrology, project development, or other characteristics of the river basin that effects headwater benefits, it should:

(i) Establish a new final charge to replace a final charge previously established under § 11.17(b)(5); or

(ii) Revise any variable of the headwater benefits formula that has become a constant in calculating a final charge.

(3) *Scope of investigations.* (i) The Commission will establish a final charge pursuant to an investigation based on information available to the Commission through the annual data submission requirements of § 11.16, if such information is adequate to establish a reasonably accurate final charge.

(ii) If the information available to the Commission is not sufficient to provide a reasonably accurate calculation of the final charge, the Commission will request additional data and conduct any studies, including studies of the hydrology of the river basin and project operations, that it determines necessary to establish the charge.

§ 11.16 Filing requirements.

(a) *Applicability.* (1) Any party subject to a headwater benefits determination under this subpart must supply project-specific data, in accordance with this section, by February 1 of each year for data from the preceding calendar year.

(2) Within 30 days of notice of initiation of an investigation under § 11.15, a party must supply project-specific data, in accordance with this section, for the years specified in the notice.

(b) *Data required from owner of the headwater project.* The owner of any headwater project constructed by the United States, a licensee, or a pre-1920 permittee that is upstream from a non-Federal hydroelectric project must submit the following:

(1) Name and location of the headwater project, including the name of the stream on which it is located.

(2) The total nameplate rating of installed generating capacity of the project, expressed in kilowatts, with the portion of total capacity that represents pumped storage generating capacity separately designated.

(3) A description of the total storage capacity of the reservoir and allocation of storage capacity to each of its functions, such as dead storage, power storage, irrigation storage, and flood control storage. Identification, by reservoir elevation, of the portion of the reservoir assigned to each of its respective storage functions.

(4) An elevation-capacity curve, or a tabulation of reservoir pool elevations with corresponding reservoir storage capacities.

(5) A copy of rule curves, coordination contracts, agreements, or other relevant data governing the release of water from the reservoir, including a separate statement of their effective dates.

(6) A curve or tabulation showing actual reservoir pool elevations throughout the immediately preceding calendar year and for each year included in an investigation.

(7) The total annual gross generation of the hydroelectric plant in kilowatt-hours, not including energy from pumped storage operation.

(8) The total number of kilowatt-hours of energy produced from pumped storage operation.

(9) The investigation costs attributed to the power generation function of the

project as of the close of the calendar year or at a specified date during the year, categorized according to that portion that is attributed to the specific power costs, and that portion that is attributed to the joint-use power costs.

(10) The portion of the joint-use power cost, and other costs required by law to be allocated to joint-use power cost, each item shown separately, that are attributable to the annual costs of interest, maintenance, and depreciation, identifying the annual interest rate and the method used to compute the depreciation charge, or the interest rate and period used to compute amortization if used in lieu of depreciation, including any differing interest rates used for major replacements or rehabilitation.

(c) *Data required from owners of downstream projects.* The owner of any hydroelectric project which is downstream from a headwater project constructed by the United States, a licensee, or pre-1920 permittee must submit the following:

(1) Name and location of the downstream project, including the name of the stream on which it is located.

(2) Total nameplate rating of the installed generating capacity of the plant, expressed in kilowatts, with the portion of total capacity that represents pumped storage generating capacity separately designated.

(3) Record of daily gross generation, not including energy used for pumped storage, and any unit outage which may have occurred.

(4) The total number of kilowatthours of energy produced from pumped storage operation.

(d) *Abbreviated data submissions.* (1) For those items in paragraphs (b) and (c) of this section in which data for the current period are the same as data furnished for a prior period, the data need not be resubmitted if the owner identifies the last period for which the data were reported.

(2) The Commission will notify the project owner that certain data items in paragraphs (b) and (c) are no longer required to be submitted annually if:

(i) A variable in the headwater benefits formula has become a constant; or

(ii) A prospective final charge, as described in §11.17(b)(5), has been established.

(e) *Additional data.* Owners of headwater projects or downstream projects must furnish any additional data required by the Commission staff under paragraph (a) of this section and may provide other data which they consider relevant.

§11.17 Procedures for payment of charges and costs.

(a) *Payment for benefits from a non-Federal headwater project.* Any billing procedures and payments determined between a non-Federal headwater project owner and a downstream project owner will occur according to the agreement of those parties.

(b) *Charges and payment for benefits from a Federal headwater project*—(1) *Interim charges.* (i) If the Commission has not established a final charge and an investigation is pending, the Commission will issue a downstream project owner a bill for the interim charge and costs and a staff report explaining the calculation of the interim charge.

(ii) An interim charge will be a percentage of the estimate by the Commission staff of what the final charge will be, as follows:

(A) 100 percent of the estimated final charge if the Commission previously has completed an investigation of the project for which it is assessed; or

(B) 80 percent of the estimated final charge if the Commission has not completed an investigation of the project for which it is assessed.

(iii) When a final charge is established for a period for which an interim charge was paid, the Commission will apply the amount paid to the final charge.

(2) *Preliminary assessment of a final charge.* Unless the project owner was assessed a final charge in the previous year, the Commission will issue to the downstream project owner a preliminary assessment of any final charge when it is determined. A staff technical report explaining the basis of the assessment will be enclosed with the preliminary assessment. Copies of the preliminary assessment will be mailed to all parties.

(3) *Opportunity to respond.* After issuance of a preliminary assessment of a final charge, parties may respond in writing within 60 days after the preliminary assessment.

(4) *Order and bill.* (i) After the opportunity for written response by the parties to the preliminary assessment of a final charge, the Commission will issue to the downstream project owner an order establishing the final charge. Copies of the order will be mailed to all parties. A bill will be issued for the amount of the final charge and costs.

(ii) If a final charge is not established prospectively under paragraph (b)(5) of this section, the Commission will issue an order and a bill for the final charge and costs each year until prospective final charges are established. After the Commission issues an order establishing a prospective final charge, a bill will be issued annually for the amount of the final charge and costs.

(5) *Prospective final charges.* When the Commission determines that historical data, including the hydrology, development, and other characteristics of the river basin, demonstrate sufficient stability to project average energy gains and section 10(f) costs, the Commission will issue to the downstream project owner an order establishing the final charge from future years. Copies of the order will be mailed to all parties. The prospective final charge will remain in effect until a new investigation is initiated under § 11.15(d)(2).

(6) *Payment under protest.* Any payment of a final charge required by this section may be made under protest if a party is also appealing the final charge pursuant to § 385.1902, or requesting rehearing. If payment is made under protest, that party will avoid any penalty for failure to pay under § 11.21.

(7) *Accounting for payments pending appeal or rehearing.* The Commission will retain any payment received for final charges from bills issued pursuant to this section in a special account. No disbursements to the U.S. Treasury will be made from the account until 31 days after the bill is issued. If an appeal under § 385.1902 or a request for rehearing is filed by any party, no disbursements to the U.S. Treasury will be made until final disposition of the appeal or request for rehearing.

(c) *Charges for costs of determinations of headwater benefits charges.* (1) Any owner of a downstream project that benefits from a Federal headwater project must pay to the United States the cost of making any investigation, study, or determination relating to the assessment of the relevant headwater benefits charge under this subpart.

(2) If any owner of a headwater or downstream project requests that the Commission determine headwater benefits charges for benefits provided by non-Federal headwater projects, the headwater project owners must pay a pro rata share of 50 percent of the cost of making the investigation and determination, in proportion to the benefits provided by their projects, and the downstream project owners must pay a pro rata share of the remaining 50 percent in proportion to the energy gains received by their projects.

(3) Any charge assessed under this paragraph is separate from and will be added to, any final or interim charge under this subpart.

Subpart C—General Procedures

§ 11.20 Time for payment.

Annual charges must be paid no later than 45 days after rendition of a bill by the Commission. If the licensee or exemptee believes that the bill is incorrect, no later than 45 days after its rendition the licensee or exemptee may file an appeal of the bill with the Chief Financial Officer. No later than 30 days after the date of issuance of the Chief Financial Officer's decision on the appeal, the licensee or exemptee may file a request for rehearing of that decision pursuant to § 385.713 of this chapter. In the event that a timely appeal to the Chief Financial Officer or a timely request to the Commission for rehearing is filed, the payment of the bill may be made under protest, and subject to refund pending the outcome of the appeal or rehearing.

[60 FR 15048, Mar. 22, 1995]

§ 11.21 Penalties.

If any person fails to pay annual charges within the periods specified in § 11.20, a penalty of 5 percent of the

total delinquent amount will be assessed and added to the total charges for the first month or part of month in which payment is delinquent. An additional penalty of 3 percent for each full month thereafter will be assessed until the charges and penalties are satisfied in accordance with law. The Commission may, by order, waive any penalty imposed by this subsection, for good cause shown.

[51 FR 24318, July 3, 1986]

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 2006

State	County	(Fee/acre/yr)
ALABAMA	ALL COUNTIES	$28.10
ARKANSAS	ALL COUNTIES	21.08
ARIZONA	COCHISE	7.01
	GILA.	
	GRAHAM.	
	LA PAZ.	
	MOHAVE.	
	NAVAJO.	
	PIMA.	
	YAVAPAI.	
	YUMA.	
	COCONINO (NORTH OF COLORADO R.).	
	COCONINO (SOUTH OF COLORADO R.).	28.10
	GREENLEE.	
	MARICOPA.	
	PINAL.	
	SANTA CRUZ.	
CALIFORNIA	IMPERIAL	14.05
	INYO.	
	LASSEN.	
	MODOC.	
	RIVERSIDE.	
	SAN BERNARDINO.	
	SISKIYOU	21.08
	ALAMEDA	35.12
	ALPINE.	
	AMADOR.	
	BUTTE.	
	CALAVERAS.	
	COLUSA.	
	CONTRA COSTA.	
	DEL NORTE.	
	EL DORADO	35.12
	FRESNO.	
	GLENN.	
	HUMBOLDT.	
	KERN.	
	KINGS.	
	LAKE.	
	MADERA.	
	MARIPOSA.	
	MENDICINO.	
	MERCED.	
	MONO.	
	NAPA.	
	NEVADA.	
	PLACER.	
	PLUMAS.	
	SACRAMENTO.	
	SAN BENITO.	
	SAN JOAQUIN.	
	SANTA CLARA.	
	SHASTA.	
	SIERRA.	
	SOLANO.	
	SONOMA.	
	STANISLAUS.	
	SUTTER.	
	TEHAMA.	
	TRINITY.	
	TULARE KINGS.	
	TUOLUMNE.	
	YOLO.	
	YUBA.	
	LOS ANGELES	42.17
	MARIN.	
	MONTEREY.	
	ORANGE.	
	SAN DIEGO.	
	SAN FRANCISCO.	
	SAN LUIS OBISPO.	
	SAN MATEO.	
	SANTA BARBARA.	
	SANTA CRUZ.	
	VENTURA.	
COLORADO	ADAMS	7.01
	ARAPAHOE.	
	BENT.	
	CHEYENNE.	
	CROWLEY.	
	ELBERT.	
	EL PASO.	
	HUERFANO.	
	KIOWA.	
	KIT CARSON.	
	LINCOLN.	
	LOGAN.	
	MOFFAT.	
	MONTEZUMA.	
	MORGAN.	
	PUEBLO.	
	SEDGEWICK.	
	WASHINGTON.	
	WELD.	
	YUMA.	
	BACA	14.05
	BROOMFIELD.	
	DOLORES.	
	GARFIELD.	
	LAS ANIMAS.	
	MESA.	
	MONTROSE.	
	OTERO.	
	PROWERS.	
	RIO BLANCO.	
	ROUTT.	
	SAN MIGUEL.	
	ALAMOSA	28.10
	ARCHULETA.	
	BOULDER.	
	CHAFFEE.	
	CLEAR CREEK.	
	CONEJOS.	
	COSTILLA.	
	CUSTER.	
	DENVER.	
	DELTA.	
	DOUGLAS.	
	EAGLE	28.10
	FREMONT.	
	GILPIN.	
	GRAND.	
	GUNNISON.	
	HINSDALE.	

State	County	(Fee/acre/yr)
	JACKSON.	
	JEFFERSON.	
	LAKE.	
	LA PLATA.	
	LARIMER.	
	MINERAL.	
	OURAY.	
	PARK.	
	PITKIN.	
	RIO GRANDE.	
	SAGUACHE.	
	SAN JUAN.	
	SUMMIT.	
	TELLER.	
CONNECTICUT.	ALL COUNTIES	7.01
FLORIDA	BAKER	42.17
	BAY.	
	BRADFORD.	
	CALHOUN.	
	CLAY.	
	COLUMBIA.	
	DIXIE.	
	DUVAL.	
	ESCAMBIA.	
	FRANKLIN.	
	GADSDEN.	
	GILCHRIST.	
	GULF.	
	HAMILTON.	
	HOLMES.	
	JACKSON.	
	JEFFERSON.	
	LAFAYETTE.	
	LEON.	
	LIBERTY.	
	MADISON.	
	NASSAU.	
	OKALOOSA	42.17
	SANTA ROSA.	
	SUWANNEE.	
	TAYLOR.	
	UNION.	
	WAKULLA.	
	WALTON.	
	WASHINGTON.	
	ALL OTHER COUNTIES	70.23
GEORGIA	ALL COUNTIES	42.17
IDAHO	CASSIA	7.01
	GOODING.	
	JEROME.	
	LINCOLN.	
	MINIDOKA.	
	ONEIDA.	
	OWYHEE.	
	POWER.	
	TWIN FALLS.	
	ADA	21.08
	ADAMS.	
	BANNOCK.	
	BEAR LAKE.	
	BENEWAH.	
	BINGHAM.	
	BLAINE.	
	BOISE.	
	BONNER.	
	BONNEVILLE.	
	BOUNDARY.	
	BUTTE.	
	CAMAS.	
	CANYON.	
	CARIBOU.	
	CLARK.	
	CLEARWATER.	
	CUSTER.	
	ELMORE.	
	FRANKLIN.	
	FREMONT.	
	GEM.	
	IDAHO	21.08
	JEFFERSON.	
	KOOTENAI.	
	LATAH.	
	LEMHI.	
	LEWIS.	
	MADISON.	
	NEZ PERCE.	
	PAYETTE.	
	SHOSHONE.	
	TETON.	
	VALLEY.	
	WASHINGTON.	
ILLINOIS	ALL COUNTIES	21.08
INDIANA	ALL COUNTIES	35.12
KANSAS	MORTON	14.05
	ALL OTHER COUNTIES	7.01
KENTUCKY	ALL COUNTIES	21.08
LOUISIANA	ALL COUNTIES	42.17
MAINE	ALL COUNTIES	21.08
MICHIGAN	ALGER	21.08
	BARAGA.	
	CHIPPEWA.	
	DELTA.	
	DICKINSON.	
	GOGEBIC.	
	HOUGHTON.	
	IRON.	
	KEWEENAW.	
	LUCE.	
	MACKING.	
	MARQUETTE.	
	MENOMINEE.	
	ONTONAGON.	
	SCHOOLCRAFT.	
	ALL OTHER COUNTIES	28.10
MINNESOTA	ALL COUNTIES	21.08
MISSISSIPPI	ALL COUNTIES	28.10
MISSOURI	ALL COUNTIES	21.08
MONTANA	BIG HORN	7.01
	BLAINE.	
	CARTER.	
	CASCADE.	
	CHOUTEAU.	
	CUSTER.	
	DANIELS.	
	MCCONE.	
	MEAGHER.	
	DAWSON.	
	FALLON.	
	FERGUS.	
	GARFIELD.	
	GLACIER.	
	GOLDEN VALLEY.	
	HILL.	
	JUDITH BASIN.	
	LIBERTY.	
	MUSSELSHELL.	
	PETROLEUM.	
	PHILLIPS.	
	PONDERA.	
	POWDER RIVER.	
	PRAIRIE.	
	RICHLAND.	
	ROOSEVELT.	
	ROSEBUD.	
	SHERIDAN.	

State	County	(Fee/acre/yr)
	TETON.	
	TOOLE.	
	TREASURE.	
	VALLEY.	
	WHEATLAND.	
	WIBAUX.	
	YELLOWSTONE.	
	BEAVERHEAD	21.08
	BROADWATER.	
	CARBON.	
	DEER LODGE	21.08
	FLATHEAD.	
	GALLATIN.	
	GRANITE.	
	JEFFERSON.	
	LAKE.	
	LEWIS & CLARK.	
	LINCOLN.	
	MADISON.	
	MINERAL.	
	MISSOULA.	
	PARK.	
	POWELL.	
	RAVALLI.	
	SANDERS.	
	SILVER BOW.	
	STILLWATER.	
	SWEET GRASS.	
NEBRASKA	ALL COUNTIES	7.01
NEVADA	CHURCHILL	3.51
	CLARK.	
	ELKO.	
	ESMERALDA.	
	EUREKA.	
	HUMBOLDT.	
	LANDER.	
	LINCOLN.	
	LYON.	
	MINERAL.	
	NYE.	
	PERSHING.	
	WASHOE.	
	WHITE PINE.	
	CARSON CITY	35.12
	DOUGLAS.	
	STORY.	
NEW HAMPSHIRE.	ALL COUNTIES	21.08
NEW MEXICO	CHAVES	7.01
	CURRY.	
	DE BACA.	
	DONA ANA	7.01
	EDDY.	
	GRANT.	
	GUADALUPE.	
	HARDING.	
	HIDALGO.	
	LEA.	
	LUNA.	
	MCKINLEY.	
	OTERO.	
	QUAY.	
	ROOSEVELT.	
	SAN JUAN.	
	SOCORRO.	
	TORRENCE.	
	RIO ARRIBA	14.05
	SANDOUAL.	
	UNION.	
	BERNALILLO	28.10
	CATRON.	
	CIBOLA.	
	COLFAX.	
	LINCOLN.	
	LOS ALAMOS.	
	MORA.	
	SAN MIGUEL.	
	SANTA FE.	
	SIERRA.	
	TAOS.	
	VALENCIA.	
NEW YORK	ALL COUNTIES	28.10
NORTH CAROLINA.	ALL COUNTIES	42.17
NORTH DAKOTA.	ALL COUNTIES	7.01
OHIO	ALL COUNTIES	28.10
OKLAHOMA	BEAVER	14.05
	CIMARRON.	
	ROGER MILLS.	
	TEXAS.	
	LE FLORE	21.08
	MC CURTAIN.	
	ALL OTHER COUNTIES	7.01
OREGON	HARNEY	7.01
	LAKE.	
	MALHEUR.	
	BAKER	14.05
	CROOK.	
	DESCHUTES.	
	GILLIAM.	
	GRANT.	
	JEFFERSON.	
	KLAMATH.	
	MORROW.	
	SHERMAN.	
	UMATILLA.	
	UNION.	
	WALLOWA.	
	WASCO.	
	WHEELER.	
	COOS	21.08
	CURRY.	
	DOUGLAS.	
	JACKSON.	
	JOSEPHINE.	
	BENTON	28.10
	CLACKAMAS.	
	CLATSOP.	
	COLUMBIA.	
	HOOD RIVER.	
	LANE.	
	LINCOLN.	
	LINN.	
	MARION.	
	MULTNOMAH.	
	POLK.	
	TILLAMOOK.	
	WASHINGTON.	
	YAMHILL.	
PENNSYLVANIA.	ALL COUNTIES	28.10
PUERTO RICO.	ALL	42.17
SOUTH CAROLINA.	ALL COUNTIES	42.17
SOUTH DAKOTA.	BUTTE	21.08
	CUSTER.	
	FALL RIVER.	
	LAWRENCE.	
	MEAD.	
	PENNINGTON.	
	ALL OTHER COUNTIES	7.01
TENNESSEE	ALL COUNTIES	28.10
TEXAS	CULBERSON	7.01

State	County	(Fee/acre/yr)
	EL PASO.	
	HUDSPETH.	
	ALL OTHER COUNTIES	42.17
UTAH	BEAVER	7.01
	BOX ELDER.	
	CARBON.	
	DUCHESNE.	
	EMERY.	
	GARFIELD.	
	GRAND.	
	IRON.	
	JUAB.	
	KANE.	
	MILLARD.	
	SAN JUAN.	
	TOOELE.	
	UINTAH.	
	WAYNE.	
	WASHINGTON	14.05
	CACHE	21.08
	DAGGETT.	
	DAVIS.	
	MORGAN.	
	PIUTE.	
	RICH	21.08
	SALT LAKE.	
	SANPETE.	
	SEVIER.	
	SUMMIT.	
	UTAH.	
	WASATCH.	
	WEBER.	
VERMONT	ALL COUNTIES	28.10
VIRGINIA	ALL COUNTIES	28.10
WASHINGTON.	ADAMS	14.05
	ASOTIN.	
	BENTON.	
	CHELAN.	
	COLUMBIA.	
	DOUGLAS.	
	FRANKLIN.	
	GARFIELD.	
	GRANT.	
	KITTITAS.	
	KLICKITAT.	
	LINCOLN.	
	OKANOGAN.	
	SPOKANE.	
	WALLA WALLA.	
	WHITMAN.	
	YAKIMA.	
	FERRY	21.08
	PEND OREILLE.	
	STEVENS.	
	CLALLAM	28.10
	CLARK.	
	COWLITZ.	
	GRAYS HARBOR.	
	ISLAND.	
	JEFFERSON.	
	KING.	
	KITSAP.	
	LEWIS.	
	MASON.	
	PACIFIC	28.10
	PIERCE.	
	SAN JUAN.	
	SKAGIT.	
	SKAMANIA.	
	SNOHOMISH.	
	THURSTON.	
	WAHKIAKUM.	
	WHATCOM.	
WEST VIRGINIA.	ALL COUNTIES	28.10
WISCONSIN	ALL COUNTIES	21.08
WYOMING	ALBANY	7.01
	CAMPBELL.	
	CARBON.	
	CONVERSE.	
	GOSHEN.	
	HOT SPRINGS.	
	JOHNSON.	
	LARAMIE.	
	LINCOLN.	
	NATRONA.	
	NIOBRARA.	
	PLATTE.	
	SHERIDAN.	
	SWEETWATER.	
	FREMONT.	
	SUBLETTE.	
	UINTA.	
	WASHAKIE.	
	BIG HORN	21.08
	CROOK.	
	PARK.	
	TETON.	
	WESTON.	
ALL OTHER ZONES.		5.92

[71 FR 2864, Jan. 18, 2006]

PART 12—SAFETY OF WATER POWER PROJECTS AND PROJECT WORKS

Subpart A—General Provisions

Sec.

Subpart B—Reports and Records

Subpart C—Emergency Action Plans

Subpart D—Inspection by Independent Consultant

Subpart E—Other Responsibilities of Applicant or Licensee

AUTHORITY: 16 U.S.C. 792–828c; 42 U.S.C. 7101–7352; E.O. 12009, 3 CFR 142 (1978).

SOURCE: Order 122, 46 FR 9036, Jan. 28, 1981, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 12 appear at 69 FR 32438, June 10, 2004.

Subpart A—General Provisions

§ 12.1 Applicability.

(a) Except as otherwise provided in this part or ordered by the Commission or its authorized representative, the provisions of this part apply to:

(1) Any project licensed under Part I of the Federal Power Act;

(2) Any unlicensed constructed project for which the Commission has determined that an application for license must be filed under Part I of the Act; and

(3) Any project exempted from licensing under Part I of the Federal Power Act, pursuant to subparts J or K of part 4 of this chapter, to the extent that the Commission has conditioned the exemption on compliance with any particular provisions of this part.

(b) The provisions of this part apply to a project that uses a Government dam only with respect to those project works, lands, and waters specifically licensed by the Commission.

§ 12.2 Rules of construction.

(a) If any term, condition, article, or other provision in a project license is similar to any provision of this part, the licensee must comply with the relevant provision of this part, unless the Commission or the Director of the Office of Energy Projects Licensing determines that compliance with the relevant provision of the license will better protect life, health, or property.

(b) A licensee may request from the Director of the Office of Energy Projects Licensing a ruling on the applicability to its actions of any provision of its license that is similar to a provision of this part. A ruling by the Director may be appealed under §385.207 of this chapter.

[Order 122, 46 FR 9036, Jan. 28, 1981, as amended by Order 225, 47 FR 19056, May 3, 1982; 49 FR 29370, July 20, 1984]

§ 12.3 Definitions.

(a) *General rule.* For purposes of this part, terms defined in section 3 of the Federal Power Act, 16 U.S.C. 796, have the same meaning as they have under the Act.

(b) *Definitions.* The following definitions apply for the purposes of this part:

(1) *Applicant* means any person, state, or municipality that has applied for a license for an unlicensed, constructed project and any owner of an unlicensed, constructed project for which the Commission has determined that an application for license must be filed.

(2) *Owner* means any person, state, or municipality, or combination thereof, that has a real property interests in a water power project sufficient to operate and maintain the project works.

(3) *Authorized Commission representative* means the Director of the Office of Energy Projects Licensing, the Director of the Division of Inspections, the Regional Engineer, or any other member of the Commission staff whom the Commission may specifically designate.

(4) *Condition affecting the safety of a project or project works* means any condition, event, or action at the project which might compromise the safety, stability, or integrity of any project work or the ability of any project work to function safely for its intended purposes, including navigation, water power development, or other beneficial public uses; or which might otherwise

adversely affect life, health, or property. Conditions affecting the safety of a project or project works include, but are not limited to:

(i) Unscheduled rapid draw-down of impounded water;

(ii) Failure of any facility that controls the release or storage of impounded water, such as a gate or a valve;

(iii) Failure or unusual movement, subsidence, or settlement of any part of a project work;

(iv) Unusual concrete deterioration or cracking, including development of new cracks or the lengthening or widening of existing cracks;

(v) Piping, slides, or settlements of materials in any dam, abutment, dike, or embankment;

(vi) Significant slides or settlements of materials in areas adjacent to reservoirs;

(vii) Significant damage to slope protection;

(viii) Unusual instrumentation readings;

(ix) New seepage or leakage or significant gradual increase in pre-existing seepage or leakage;

(x) Sinkholes;

(xi) Significant instances of vandalism or sabotage;

(xii) Natural disasters, such as floods, earthquakes, or volcanic activity;

(xiii) Any other signs of instability of any project work.

(5) *Constructed project* means any project with an existing dam.

(6) *Dam* means any structure for impounding or diverting water.

(7) *Development* means that part of a project comprising an impoundment and its associated dams, forebays, water conveyance facilities, power plants, and other appurtenant facilities. A project may comprise one or more developments.

(8) *Modification* means any activity, including repair or reconstruction, that in any way changes the physical features of the project from the state reflected in the plans or drawings or other documents filed with the Commission.

(9) *Project emergency* means an impending or actual sudden release of water at the project caused by natural disaster, accident, or failure of project works.

(10) *Regional Engineer* means the person in charge of the Commission's regional office for the region (Atlanta, Chicago, Portland, New York, or San Francisco) where a particular project is located.

(11) *Act* means the Federal Power Act.

[Order 122, 46 FR 9036, Jan. 28, 1981, as amended at 49 FR 29370, July 20, 1984; Order 647, 69 FR 32438, June 10, 2004]

§ 12.4 Staff administrative responsibility and supervisory authority.

(a) *Administrative responsibility.* The Director of the Office of Energy Projects Licensing is responsible for administering the Commission's project safety program and reports directly to the Chairman of the Federal Energy Regulatory Commission.

(b) *Supervisory authority of the Regional Engineer or other authorized representative.* (1) Any water power project and the construction, operation, maintenance, use, repair, or modification of any project works are subject to the inspection and the supervision of the Regional Engineer or any other authorized Commission representative for the purpose of:

(i) Achieving or protecting the safety, stability, and integrity of the project works or the ability of any project work to function safely for its intended purposes, including navigation, water power development, or other beneficial public uses; or

(ii) Otherwise protecting life, health, or property.

(2) For the purposes set forth in paragraph (b)(1) of this section, a Regional Engineer or other authorized Commission representative may:

(i) Test or inspect any water power project or project works or require that the applicant or licensee perform such tests or inspections or install monitoring instruments;

(ii) Require an applicant or a licensee to submit reports or information, regarding:

(A) The design, construction, operation, maintenance, use, repair, or modification of a water power project or project works; and

(B) Any condition affecting the safety of a project or project works or any death or injury that occurs at, or might be attributable to, the water power project;

(iii) Require an applicant or a licensee to modify:

(A) Any emergency action plan filed under subpart C of this part; or

(B) Any plan of corrective measures, including related schedules, submitted after the report of an independent consultant pursuant to §12.37 or any other inspection report;

(iv) Require an applicant or licensee to take any other action with respect to the design, construction, operation, maintenance, repair, use, or modification of the project or its works that is, in the judgment of the Regional Engineer or other authorized Commission representative, necessary or desirable.

(v) Establish the time for an applicant or licensee to provide a schedule for or to perform any actions specified in this paragraph.

(c) *Appeal, stay, rescission, or amendment of order or directive.* (1) Any order or directive issued under this section or under the provisions of subparts B through E of this part by a Regional Engineer or other authorized Commission representative may be appealed to the Commission under §385.207 of this chapter.

(2) Any order or directive issued under this section by a Regional Engineer or other authorized Commission representative is immediately effective and remains in effect until:

(i) The Regional Engineer or other authorized Commission representative who issued the order or directive rescinds or amends that order or directive or stays its effect; or

(ii) The Commission stays the effect of the order or directive, or amends or rescinds the order or directive on appeal.

(3) An appeal or motion for rescission, amendment, or stay of any order or directive issued under this section must contain a full explanation of why granting the appeal or the request for rescission or amendment of the order or directive, or for stay for the period requested, will not endanger life, health, or property.

[Order 122, 46 FR 9036, Jan. 28, 1981, as amended by Order 225, 47 FR 19056, May 3, 1982; 49 FR 29370, July 20, 1984]

§12.5 Responsibilities of licensee or applicant.

A licensee or applicant must use sound and prudent engineering practices in any action relating to the design, construction, operation, maintenance, use, repair, or modification of a water power project or project works.

Subpart B—Reports and Records

§12.10 Reporting safety-related incidents.

(a) *Conditions affecting the safety of a project or its works*—1) *Oral reports.* An applicant or licensee must report by telephone to the Regional Engineer any condition affecting the safety of a project or projects works, as defined in §12.3(b)(4). The initial oral report must be made as soon as practicable after that condition is discovered, without unduly interfering with any necessary or appropriate emergency repair, alarm, or other emergency action procedure.

(2) *Written reports.* Following the initial oral report required in paragraph (a)(1), the applicant or licensee must submit to the Regional Engineer a written report on the condition affecting the safety of the project or project works verified in accordance with §12.13. The written report must be submitted within the time specified by the Regional Engineer and must contain any information the Regional Engineer directs, including:

(i) The causes of the condition;

(ii) A description of any unusual occurrences or operating circumstances preceding the condition;

(iii) An account of any measure taken to prevent worsening of the condition;

(iv) A detailed description of any damage to project works and the status of any repair;

(v) A detailed description of any personal injuries;

(vi) A detailed description of the nature and extent of any private property damages; and

(vii) Any other relevant information requested by the Regional Engineer.

(3) The level of detail required in any written report must be commensurate with the severity and complexity of the condition.

(b) *Deaths or serious injuries.* (1) Promptly after becoming aware of any drowning or other accident resulting in death or serious injury that occurs at the project, the applicant or licensee must report that drowning or other accident to the Regional Engineer in writing, including a description of the cause and location of the accident.

(2) The written report of any death or serious injury considered or alleged to be project related must also describe any remedial actions taken or proposed to avoid or reduce the chance of similar occurrences in the future and be verified in accordance with §12.13.

(3) Accidents that are not project-related may be reported by providing a copy of a clipping from a newspaper article, if available.

(4) For the purposes of this paragraph, *project-related* includes any deaths or serious injuries involving a dam, spillway, intake, or power line, or which take place at or immediately above or below a dam.

§12.11 Reporting modifications of the project or project works.

(a) *Reporting requirement.* Regardless of whether a particular modification is permitted without specific prior Commission approval, an applicant or licensee must report any modification of the project or project works to the Regional Engineer in writing, verified in accordance with §12.13, at the time specified in paragraph (b) of this section.

(b) *Time of reporting.* (1) Any modification that is an emergency measure taken in response to a condition affecting the safety of the project or project works must be submitted with the report of that condition required by §12.10(a)(2).

(2) In all other instances, the modification must be reported at least 60 days before work on the modification begins.

§12.12 Maintenance of records.

(a) *Kinds of records*—1) *General rule.* Except as provided in paragraph (a)(2) of this section, the applicant or licensee must maintain as permanent project records in addition to those required in part 125 of this chapter, the following information:

(i) Engineering and geological data relating to design, construction, maintenance, repair, or modification of the project, including design memoranda and drawings, laboratory and other testing reports, geologic data (such as maps, sections, or logs of exploratory borings or trenches, foundation treatment, and excavation), plans and specifications, inspection and quality control reports, *as built* construction drawings, designers' operating criteria, photographs, and any other data necessary to demonstrate that construction, maintenance, repair, or modification of the project has been performed in accordance with plans and specifications;

(ii) Instrumentation observations and data collected during construction, operation, or maintenance of the project, including continuously maintained tabular records and graphs illustrating the data collected pursuant to §12.41; and

(iii) The operational and maintenance history of the project, including:

(A) The dates, times, nature, and causes of any complete or partial unscheduled shut-down, suspension of project operations, or reservoir filling restrictions related to the safety of the project or project works; and

(B) Any reports of project modifications, conditions affecting the safety of the project or project works, or deaths or serious injuries at the project.

(2) *Exception.* The applicant or licensee is not required to maintain as permanent project records any information specified in paragraph (a)(1) of this section that was or reasonably would have been prepared before the applicant or licensee acquired control of the project and that the applicant or the licensee never acquired or reasonably could have acquired.

(b) *Location of records*—1) *Original records.* The applicant or licensee must maintain the originals of all permanent project records at a central location, such as the project site or the

main business office of the applicant or licensee, secure from damage from any conceivable failure of the project works and convenient for inspection. The applicant or licensee must keep the Regional Engineer advised of the location of the permanent project records.

(2) *Record copies.* If the originals of the permanent project records are maintained at a central location other than the project site, the applicant or licensee must maintain at the project site copies of at least the project Exhibit G or L (design drawings), instrumentation data, and operational history that are necessary to the safe and efficient operation of the project.

(3) In accordance with the provisions of part 125 of this chapter, the applicant or licensee may maintain original records, or record copies at the project site, in microform, if appropriate equipment is readily available to view the records.

(c) *Transfer of records.* If the project is taken over by the United States at the end of a license term or the Commission issues a new license to a different licensee, the prior licensee must transfer the originals of all permanent project records to the custody of the administering Federal agency or department or to the new licensee.

§ 12.13 Verification form.

If a document submitted in accordance with the provisions of this part must be verified, the form of verification attached to the document must be the following:

State of [ ],
County of [ ], ss:

The undersigned, being first duly sworn, states that [he, she] has read the above document and knows the contents of it, and that all of the statements contained in that document are true and correct, to the best of [his, her] knowledge and belief.

[Name of person signing]

Sworn to and subscribed before me this [day] of [month], [year].

[Seal]

[Signature of notary public or other state or local official authorized by law to notarize documents.]

Subpart C—Emergency Action Plans

§ 12.20 General requirements.

(a) Unless provided with a written exemption pursuant to §12.21, every applicant or licensee must develop and file with the Regional Engineer three copies of an emergency action plan and appendices, verified in accordance with §12.13.

(b) The emergency action plan must be:

(1) Developed in consultation and cooperation with appropriate Federal, state, and local agencies responsible for public health and safety; and

(2) Designed to provide early warning to upstream and downstream inhabitants, property owners, operators of water-related facilities, recreational users, and other persons in the vicinity who might be affected by a project emergency as defined in §12.3(b)(9).

§ 12.21 Exemptions.

(a) *Grant of exemption.* Except as provided in paragraph (b), if an applicant or licensee satisfactorily demonstrates that no reasonably foreseeable project emergency would endanger life, health, or property, the Regional Engineer may exempt the applicant or licensee from filing an emergency action plan.

(b) *No exemption.* A licensee or applicant may not be exempted from the requirements of §12.22(c) for a radiological response plan.

(c) *Conditions of exemptions.* (1) An applicant or licensee who receives an exemption from filing an emergency action plan has the continuing responsibility to review circumstances upstream and downstream from the project to determine if, as a result of changed circumstances, a project emergency might endanger life, health, or property.

(2) Promptly after the applicant or licensee learns that, as a result of any change in circumstances, a project emergency might endanger life, health, or property, the applicant or licensee must inform the Regional Engineer of that changed condition without unduly delaying the preparation and implementation of the emergency action plan.

(3) Comprehensive review of the necessity for an emergency action plan must be conducted at least once each year.

(d) *Revocation of exemption.* (1) The Regional Engineer may revoke an exemption granted under this section if it is determined that, as a result of any change in circumstances, a project emergency might endanger life, health, or property.

(2) If an exemption is revoked, the applicant or licensee must file an emergency action plan within the time specified by the Regional Engineer.

§ 12.22 Contents of emergency action plan.

(a) *Contents*—(1) *The plan itself.* An emergency action plan must conform with the guidelines established, and from time to time revised, by the Director of the Office of Energy Projects Licensing (available from the division of Inspections or the Regional Engineer) to provide:

(i) Instructions to project operators and attendants and other responsible personnel about the actions they are to take during a project emergency;

(ii) Detailed plans for notifying potentially affected persons, appropriate Federal, state, and local agencies, including public safety and law enforcement bodies, and medical units; and

(iii) Procedures for controlling the flow of water, including actions to reduce in-flows to reservoirs, such as limiting outflows from upstream dams or control structures, and actions to reduce downstream flows, such as increasing or decreasing outflows from downstream dams or control structures, on the waterway on which the project is located or its tributaries.

(2) *Appendix to the plan.* Each copy of the emergency action plan submitted to the Regional Engineer must be accompanied by an appendix conforming with the guidelines established by the Director of the Office of Energy Projects Licensing that contains:

(i) Plans for training project operators, attendants, and other responsible personnel to respond properly during a project emergency, including instructions on the procedures to be followed throughout a project emergency and the manner in which the licensee will periodically review the knowledge and understanding that these personnel have of those procedures;

(ii) A summary of the study used for determining the upstream and downstream areas that may be affected by sudden release of water, including a summary of all criteria and assumptions used in the study and, if required by the Regional Engineer, inundation maps; and

(iii) Documentation of consultations with Federal, state, and local agencies, including public safety and law enforcement bodies, and medical units.

(b) *Special factors.* The applicant or licensee must take into account in its emergency action plan the time of day, particularly hours of darkness, in establishing the proper actions and procedures for use during a project emergency.

(c) *Additional requirements for projects near nuclear power plants*—1) *Radiological response plan.* If the personnel operating any powerhouse or any spillway control facilities, such as gates or valves, of a project would be located within ten miles of a nuclear power plant reactor, the applicant or licensee must file, separately or as a supplement to any required emergency action plan, a radiological response plan that provides for emergency procedures to be taken if an accident or other incident results in the release of radioactive materials from the nuclear power plant reactor.

(2) A radiological response plan must:

(i) To the maximum extent practicable, include sufficient procedural safeguards to ensure that, during or following an accident or other incident involving the nearby nuclear power plant reactor, the project may be safely operated and, if evacuation is necessary, the project may be left unattended without danger to the safety of any project dam or to life, health, or safety upstream or downstream from the project; and

(ii) Explain the provisions, developed after consultation with the direct purchasers of project power, for cessation, curtailment, or continuation of generation of electric power at the project during or following an accident or other incident involving the nearby nuclear power plant reactor.

(3) *Time of filing radiological response plan.* (i) For a constructed project with an otherwise acceptable emergency action plan on file, any radiological response plan required must be filed:

(A) If an operating license for the nuclear power plant has been issued on or before March 1, 1981, not later than three months from March 1, 1981; or

(B) In all other instances, not later than three months after the date an operating license for the nuclear power plant is issued.

(ii) For any project not described in §12.22(c)(3)(i), any radiological response plan required must be filed contemporaneously with the emergency action plan or, if the project has been exempted from filing an emergency action plan, at the time the emergency action plan would otherwise have been required to be filed pursuant to §12.23.

[Order 122, 46 FR 9036, Jan. 28, 1981, as amended at 49 FR 29370, July 20, 1984]

§12.23 Time for filing emergency action plan.

(a) *Unconstructed project.* (1) Except as set forth in paragraph (a)(2), the emergency action plan for an unconstructed project must be filed no later than 60 days before the initial filling of the project reservoir begins.

(2) *Temporary impoundment during construction.* (i) For any unconstructed project, if a temporary impoundment would be created during construction, such as through construction of temporary or permanent cofferdams or large sediment control structures, and an accident to or failure of the impounding structures might endanger construction workers or otherwise endanger public health or safety, a temporary construction emergency action plan must be filed no later than 60 days before construction begins.

(ii) No later than 60 days before the initial filling of a project reservoir begins at a project for which a temporary emergency action plan has been filed the applicant or licensee must file modifications to that plan or a new plan, taking into account the differences in circumstances between the construction and post-construction periods.

(b) *Unlicensed constructed project.* (1) If the Commission has determined on or before March 1, 1981 that a license is required for an unlicensed constructed project, the emergency action plan for that project must be filed no later than:

(i) Six months after March 1, 1981; or

(ii) Any earlier date specified by the Commission or its authorized representative.

(2) Except as set forth in paragraph (b)(1) of this section, the emergency action plan for an unlicensed constructed project must be filed no later than the earliest of:

(i) Six months after the date that a license application is filed;

(ii) Six months after the date that the Commission issues an order determining that licensing is required; or

(iii) A date specified by the Commission or its authorized representative.

(c) *Licensed constructed project.* If a licensed constructed project does not have an acceptable emergency action plan on file on March 1, 1981 the emergency action plan must be filed no later than:

(1) Six months after March 1, 1981; or

(2) Any earlier date specified by the Commission or its authorized representative.

(d) For good cause shown, the Regional Engineer may grant an extension of time for filing all or any part of an emergency action plan.

§12.24 Review and updating of plans.

(a) The emergency action plan must be continually updated to reflect any changes in the names or titles of project operators and attendants and other personnel with specified responsibilities for actions in an emergency and any changes in names of persons to call, telephone numbers, radio call signals, or other information critical to providing notification to affected persons, Federal, state, and local agencies, and medical units.

(b) An applicant or licensee has continuing responsibility to review the adequacy of the emergency action plan in light of any significant changes in upstream or downstream circumstances which might affect water flows or the location or extent of the areas, persons, or property that might be harmed in a project emergency.

(c) Promptly after an applicant or licensee learns of any change in circumstances described in paragraph (b) of this section, the applicant or licensee must:

(1) Inform the Regional Engineer of that change in circumstances;

(2) Consult and cooperate with appropriate Federal, state, and local agencies responsible for public health and safety to determine any advisable revisions to the emergency action plan; and

(3) File with the Regional Engineer three copies of any revisions to the appropriate studies, maps, plans, procedures, or other information in the emergency action plan itself or its appendices that have changed as a result of that consultation.

(d) An applicant or licensee must conduct a comprehensive review of the adequacy of the emergency action plan at least once each year.

§ 12.25 Posting and readiness.

(a) A copy of the current emergency action plan itself must be posted in a prominent location readily accessible to the licensee's or applicant's operating personnel who are responsible for controlling water flows and for notifying public health and safety agencies and affected persons.

(b) Each licensee or applicant must annually test the state of training and readiness of key licensee or applicant personnel responsible for responding properly during a project emergency to ensure that they know and understand the procedures to be followed throughout a project emergency.

Subpart D—Inspection by Independent Consultant

§ 12.30 Applicability.

This subpart applies to any licensed project development that has a dam:

(a) That is more than 32.8 feet (10 meters) in height above streambed, as defined in § 12.31(c);

(b) That impounds an impoundment with a gross storage capacity of more than 2,000 acre-feet (2.5 million cubic meters); or

(c) That has a high hazard potential and is determined by the Regional Engineer or other authorized Commission representative to require inspection by an independent consultant under this subpart.

§ 12.31 Definitions.

For purposes of this subpart:

(a) *Independent consultant* means any person who:

(1) Is a licensed professional engineer;

(2) Has at least 10 years experience and expertise in dam design and construction and in the investigation of the safety of existing dams; and

(3) Is not, and has not been within two years before being retained to perform an inspection under this subpart, an employee of the licensee or its affiliates or an agent acting on behalf of the licensee or its affiliates.

(b) *Dam that has a high hazard potential* means any dam whose failure, in the judgment of the Commission or its authorized representative, might endanger human life or cause significant property damage, or which meets the criteria for high hazard potential as defined by the Corps of Engineers in 33 CFR part 222.

(c) *Height above streambed* means:

(1) For a dam with a spillway, the vertical distance from the lowest elevation of the natural streambed at the downstream toe of the dam to the maximum water storage elevation possible without any discharge from the spillway. The maximum water storage elevation is:

(i) For gated spillways, the elevation of the tops of the gates;

(ii) For ungated spillways, the elevation of the spillway crest or the top of any flashboards, whichever is higher;

(2) For a dam without a spillway, the vertical distance from the lowest elevation of the natural streambed at the downstream tow of the dam to the lowest point on the crest of the dam.

(d) *Gross storage capacity* means the maximum possible volume of water impounded by a dam with zero spill, that is, without the discharge of water over the dam or a spillway.

(e) The Director of the Office of Energy Projects Licensing may, for good cause shown, grant a waiver of the 10 year requirement in paragraph (a)(2) of this section. Any petition for waiver

under this paragraph must be filed in accordance with §1.7(b) of this chapter.

[Order 122, 46 FR 9036, Jan. 28, 1981, as amended at 49 FR 29370, July 20, 1984]

§ 12.32 General inspection requirement.

In accordance with the procedures in §12.35, the project works of each development to which this subpart applies, excluding transmission and transformation facilities and generating equipment, must be periodically inspected and evaluated by or under the responsibility and direction of at least one independent consultant, who may be a member of a consulting firm, to identify any actual or potential deficiencies, whether in the condition of those project works or in the quality or adequacy of project maintenance, surveillance, or methods of operation, that might endanger public safety.

§ 12.33 Exemption.

(a) Upon written request from the licensee, the Director of the Office of Energy Projects Licensing may grant an exemption from the requirements of this subpart in extraordinary circumstances that clearly establish good cause for exemption.

(b) Good cause for exemption may include the finding that the development in question has no dam except dams that meet the criteria for low hazard potential as defined by the Corps of Engineers in 33 CFR part 222.

[Order 122, 46 FR 9036, Jan. 28, 1981, as amended at 49 FR 29370, July 20, 1984]

§ 12.34 Approval of independent consultant.

At least 60 days before the initiation of an inspection under this subpart, the licensee must submit to the Director of the Office of Energy Projects Licensing for approval, with a copy to the Regional Engineer, a detailed resume that (a) describes the experience of the independent consultant; and, (b) shows that the consultant is an independent consultant as defined in §12.31(a).

[Order 122, 46 FR 9036, Jan. 28, 1981, as amended at 49 FR 29370, July 20, 1984]

§ 12.35 Specific inspection requirements.

(a) *Scope of inspection.* The inspection by the independent consultant shall include:

(1) Due consideration of all relevant reports on the safety of the development made by or written under the direction of Federal or state agencies, submitted under Commission regulations, or made by other consultants;

(2) Physical field inspection of the project works and review and assessment of all relevant data concerning:

(i) Settlement;

(ii) Movement;

(iii) Erosion;

(iv) Seepage;

(v) Leakage;

(vi) Cracking;

(vii) Deterioration;

(viii) Seismicity;

(ix) Internal stress and hydrostatic pressures in project structures or their foundations or abutments;

(x) The functioning of foundation drains and relief wells;

(xi) The stability of critical slopes adjacent to a reservoir or project works; and

(xii) Regional and site geological conditions; and

(3) Specific evaluation of:

(i) The adequacy of spillways;

(ii) The effects of overtopping of non-overflow structures;

(iii) The structural adequacy and stability of structures under all credible loading conditions;

(iv) The relevant hydrological data accumulated since the project was constructed or last inspected under this subpart;

(v) The history of the performance of the project works through analysis of data from monitoring instruments; and

(vi) The quality and adequacy of maintenance, surveillance, and methods of project operations for the protection of public safety.

(b) *Evaluation of spillway adequacy.* The adequacy of any spillway must be evaluated by considering hazard potential which would result from failure of the project works during flood flows.

(1) If structural failure would present a hazard to human life or cause significant property damage, the independent consultant must evaluate the ability of

project works to withstand the loading or overtopping which may occur from a flood up to the probable maximum flood or the capacity of spillways to prevent the reservoir from rising to an elevation that would endanger the project works.

(2) If structural failure would not present a hazard to human life of cause significant property damage, spillway adequacy may be evaluated by means of a design flood of lesser magnitude than the probable maximum flood, if the report of the independent consultant pursuant to §12.37 provides a detailed explanation of the bases for the finding that structural failure would not present a hazard to human life or cause significant property damage.

§12.36 Emergency corrective measures.

If, in the course of an inspection, an independent consultant discovers any condition for which emergency corrective measures are advisable, the independent consultant must immediately notify the licensee and the licensee must report that condition to the Regional Engineer pursuant to §12.10(a) of this part.

§12.37 Report of the independent consultant.

(a) *General requirement.* Following inspection of a project development as required under this subpart, the independent consultant must prepare a report and the licensee must file three copies of that report with the Regional Engineer. The report must conform to the provisions of this section and be satisfactory to the authorized Commission representative.

(b) *General information in the initial report.* (1) The initial report filed under this subpart for any project development must contain:

(i) A description of the project development;

(ii) A map of the region indicating the location of the project development;

(iii) Plans, elevations, and sections of the principal project works;

(iv) A summary of the design assumptions, design analyses, spillway design flood, and the factors of safety used to evaluate the structural adequacy and stability of the project works; and

(v) A summary of the geological conditions that may affect the safety of the project works.

(2) To the extent that the information and analyses required in paragraph (b)(1) of this section, are contained in a report of an independent consultant prepared and filed in compliance with Commission regulations in effect before March 1, 1981 the information and analyses may be incorporated by specific reference into the first report prepared and filed under this subpart.

(c) *Information required for all reports.* Any report of an independent consultant filed under this subpart must contain the information specified in this paragraph.

(1) *Monitoring information.* The report must contain monitoring information that includes time-versus-reading graphs depicting data compiled from any existing critical or representative monitoring instruments that measure the behavior, movement, deflection, or loading of project works or from which the stability, performance, or functioning of the structures may be determined.

(i) Any monitoring data plotted on graphs must be presented in a manner that will facilitate identification and analysis of trends. The data may be summarized to facilitate graphical representation.

(ii) Plan and sectional drawings of project structures sufficient to show the location of all critical or representative existing monitoring instruments must be included. If these drawings have been included in a previous report prepared and filed by an independent consultant, they may be incorporated by specific reference to that earlier report.

(2) *Analyses.* The report must:

(i) Analyze the safety of the project works and the maintenance and methods of operation of the development fully in light of the independent consultant's reviews, field inspections, assessments, and evaluations described in §12.35;

(ii) Identify any changes in the information and analyses required by paragraph (b) of this section that have occurred since the last report by an independent consultant under this subpart and analyze the implications of those changes; and

(iii) Analyze the adequacy of existing monitoring instruments, periodic observation programs, and other methods of monitoring project works and conditions effecting the safety of the project or project works with respect to the development.

(3) *Incorporation by reference.* To the extent that conditions, assumptions, and available information have not changed since the last previous report by an independent consultant under this subpart, the analyses required under paragraphs (c)(2)(i) and (ii) of this section may be incorporated by specific reference to the last previous report.

(4) *Recommendations.* Based on the independent consultant's field observations and evaluations of the project works and the maintenance, surveillance, and methods of operation of the development, the report must contain the independent consultant's recommendations on:

(i) Any corrective measures necessary for the structures or for the maintance or surveillance procedures or methods of operation of the project works;

(ii) A reasonable time to carry out each corrective measure; and

(iii) Any new or additional monitoring instruments, periodic observations, or other methods of monitoring project works or conditions that may be required.

(5) *Dissenting views.* If the inspection and report were conducted and prepared by more than one independent consultant, the report must clearly indicate any dissenting views concerning the analyses or recommendations of the report that might be held by any individual consultant.

(6) *List of participants.* The report must identify all professional personnel who have participated in the inspection of the project or in preparation of the report and the independent consultant who directed those activities.

(7) *Statement of independence.* The independent consultant must declare that all conclusions and recommendations in the report are made independently of the licensee, its employees, and its representatives.

(8) *Signature.* The report must be signed by each independent consultant responsible for the report.

§ 12.38 Time for inspections and reports.

(a) *General rule.* After the initial inspection and report under this subpart for a project development, a new inspection under this subpart must be completed and the report on it filed not later than five years from the date the last report on an inspection was to be filed under this subpart.

(b) *Initial inspection and report.* (1) For any development that has a dam that is more than 32.8 feet (10 meters) in height above streambed or impounds an impoundment with a gross storage capacity of more than 2,000 acre feet (2.5 million cubic meters), which development was constructed before the date of issuance of the order licensing or amending a license to include that development, the initial inspection under this subpart must be completed and the report on it filed not later than two years after the date of issuance of the order licensing the development or amending the license to include the development.

(2) For any development that was constructed after the date of issuance of the order licensing or amending a license to include the development, the initial inspection under this subpart must be completed and the report on it filed not later than five years from the date of first commercial operation, or the date on which the impoundment first reaches its normal maximum surface elevation, whichever occurs first.

(3) For any development not set forth in either subparagraph (b)(1) or (b)(2), the initial inspection under this subpart must be completed and the report on it filed by a date specified by the Regional Engineer. The filing date must not be more than two years after the date of notification that an inspection and report under this subpart are required.

(4) The last independent consultant's inspection and report made for a development before March 1, 1981 in compliance with the Commission's rules then in effect is deemed to fulfill the requirements for an initial inspection and report under this subpart for that development, except that the first report filed under this subpart for that development after March 1, 1981 must contain the information and analyses required by §12.37(b).

(c) *Extension of time.* For good cause shown, the Regional Engineer may extend the time for filing an independent consultant's report under this subpart.

§12.39 Taking corrective measures after the report.

(a) *Corrective plan and schedule.* (1) Not later than 60 days after the report of the independent consultant is filed with the Regional Engineer, the licensee must submit to the Regional Engineer three copies of a plan and schedule for designing and carrying out any corrective measures that the licensee proposes.

(2) The plan and schedule may include any proposal, including taking no action, that the licensee considers a preferable alternative to any corrective measure recommended in the report of the independent consultant. Any proposed alternative must be accompanied by the licensee's complete justification and detailed analysis and evaluation in support of that alternative.

(b) *Carrying out the plan.* The licensee must complete all corrective measures in accordance with the plan and schedule submitted to, and approved or modified by, the Regional Engineer.

(c) *Extension of time.* For good cause shown, the Regional Engineer may extend the time for filing the plan and schedule required by this section.

Subpart E—Other Responsibilities of Applicant or Licensee

§12.40 Quality control programs.

(a) *General rule.* During any construction, repair, or modification of project works, including any corrective measures taken pursuant to §12.39 of this part, the applicant or licensee must maintain any quality control program that may be required by the Regional Engineer, commensurate with the scope of the work and meeting any requirements or standards set by the Regional Engineer. If a quality control program is required, the construction, repair, or modification may not begin until the Regional Engineer has approved the program.

(b) If the construction, repair, or modification work is performed by a construction contractor, quality control inspection must be performed by the licensee, the design engineer, or an independent firm, other than the construction contractor, directly accountable to the licensee. This paragraph is not intended to prohibit additional quality control inspections by the construction contractor, or a firm accountable to the construction contractor, for the construction contractor's purposes.

(c) If the construction, repair, or modification of project works is performed by the applicant's or licensee's own personnel, the applicant or licensee must provide for separation of authority within its organization to make certain that the personnel responsible for quality control inspection are, to the satisfaction of the Regional Engineer or other authorized Commission representative, independent from the personnel who are responsible for the construction, repair or modification.

§12.41 Monitoring instruments.

(a) In designing a project, a licensee must make adequate provision for installing and maintaining appropriate monitoring instrumentation whenever any physical condition that might affect the stability of a project structure has been discovered or is anticipated. The instrumentation must be satisfactory to the Regional Engineer and may include, for example, instruments to monitor movement of joints, foundation or embankment deformation, seismic effects, hydrostatic pore pressures, structural cracking, or internal stresses on the structure.

(b) If an applicant or licensee discovers any condition affecting the safety of the project or project works during the course of construction or operation, the applicant or licensee must

install and maintain any monitoring devices and instruments that may be required by the Regional Engineer or other authorized Commission representative to monitor that condition.

§ 12.42 Warning and safety devices.

To the satisfaction of, and within a time specified by, the Regional Engineer, an applicant or licensee must install, operate, and maintain any signs, lights, sirens, barriers, or other safety devices that may reasonably be necessary or desirable to warn the public of fluctuations in flow from the project or otherwise to protect the public in the use of project lands and waters.

§ 12.43 Power and communication lines and gas pipelines.

(a) A licensee must take all reasonable precautions, and comply with all reasonable specifications that may be provided by the Regional Engineer, to ensure that any power or communication line or gas pipeline that is located over, under, or in project waters does not obstruct navigation for recreational or commercial purposes or otherwise endanger public safety.

(b) Clearances between any power or communication line constructed after March 1, 1981 and any vessels using project waters must be at least sufficient to conform to any applicable requirements of the National Electrical Safety Code in effect at the time the power or communication line is constructed.

(c) The Regional Engineer may require a licensee or applicant to provide signs at or near power or communication lines to advise the public of the clearances for any power or communication lines located over, under, or in project waters.

§ 12.44 Testing spillway gates.

(a) *General requirement.* An applicant or licensee must make adequate provision, to the satisfaction of the Regional Engineer or other authorized Commission representative, to ensure that all spillway gates are operable at all times, particularly during adverse weather conditions.

(b) *Annual test.* (1) At least once each year, each spillway gate at a project must be operated to spill water, either during regular project operation or on a test basis.

(2) If an applicant or licensee does not operate each spillway gate on a test basis during the periodic inspection by the Commission staff, the applicant or licensee must submit to the Regional Engineer at least once each year a written statement, verified in accordance with § 12.13, that each spillway has been operated at least once during the twelve months preceding the inspection.

(c) *Load-test of standby power.* (1) An applicant or licensee must load-test the standby emergency power for spillway gate operation at regular intervals, but not less than once during each year, and submit to the Regional Engineer, at least once each year, a written statement, verified in accordance with § 12.13, describing the intervals at which the standby emergency power was load-tested during the year preceding the inspection.

(2) The Commission staff may direct that a spillway gate be operated using standby emergency power during the periodic inspection.

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENSED PROJECTS

Subpart A—General Provisions

Sec.

Subpart B—Applications for Projects Subject to Sections 14 and 15 of the Federal Power Act

AUTHORITY: 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

SOURCE: Order 513, 54 FR 23806, June 2, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 16.1 Applicability.

This part applies to the filing and processing of an application for:

(a) A new license, a nonpower license, or an exemption from licensing for a hydroelectric project with an existing license subject to the provisions of sections 14 and 15 of the Federal Power Act.

(b) A subsequent license or an exemption from licensing for a hydroelectric project with an existing minor license or minor part license not subject to the provisions of sections 14 and 15 of the Federal Power Act because those sections were waived pursuant to section 10(i) of the Federal Power Act.

(c) Any potential applicant for a new or subsequent license for which the deadline for the notice of intent required by §16.6 falls on or after July 23, 2005 and which wishes to develop and file its application pursuant to this part, must seek Commission authorization to do so pursuant to the provisions of part 5 of this chapter.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 2002, 68 FR 51139, Aug. 25, 2003]

§ 16.2 Definitions.

For purposes of this part:

(a) *New license* means a license, except an annual license, for a water power project that is issued under section 15(a) of the Federal Power Act after an original license expires.

(b) *New license application filing deadline*, as provided in section 15(c)(1) of the Federal Power Act, is the date 24 months before the expiration of an existing license.

(c) *Nonpower license* means a license for a nonpower project issued under section 15(b) of the Federal Power Act.

(d) *Subsequent license* means a license for a water power project issued under Part I of the Federal Power Act after a minor or minor part license that is not

subject to sections 14 and 15 of the Federal Power Act expires.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 513–A, 55 FR 15, Jan. 2, 1990; Order 533, 56 FR 23154, May 20, 1991]

§ 16.3 Public notice of projects under expiring licenses.

In addition to the notice of a licensee's intent to file or not to file an application for a new license provided in §16.6(d), the Commission will publish, in its annual report and annually in the FEDERAL REGISTER, a table showing the projects whose licenses will expire during the succeeding six years. The table will:

(a) List the licenses according to their expiration dates; and

(b) Contain the following information: license expiration date; licensee's name; project number; type of principal project works licensed, *e.g.*, dam and reservoir, powerhouse, transmission lines; location by state, county, and stream; location by city or nearby city when appropriate; whether the existing license is subject to sections 14 and 15 of the Federal Power Act; and plant installed capacity.

§ 16.4 Acceleration of a license expiration date.

(a) *Request for acceleration.* (1) A licensee may file with the Commission, in accordance with the formal filing requirements in subpart T of part 385 of this chapter, a written request for acceleration of the expiration date of its existing license, containing the statements and information specified in §16.6(b) and a detailed explanation of the basis for the acceleration request.

(2) If the Commission grants the request for acceleration pursuant to paragraph (c), the Commission will deem the request for acceleration to be a notice of intent under §16.6 and, unless the Commission directs otherwise, the licensee shall make available the information specified in §16.7 no later than 90 days from the date that the Commission grants the request for acceleration.

(b) *Notice of request for acceleration.* (1) Upon receipt of a request for acceleration, the Commission will give notice of the licensee's request and provide a 45-day period for comments by interested persons by:

(i) Publishing notice in the Federal Register;

(ii) Publishing notice once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies and Indian tribes by mail.

(2) The notice issued pursuant to paragraphs (1) (i) and (ii) and the written notice given pursuant to paragraph (1)(iii) will be considered as fulfilling the notice provisions of §16.6(d) should the Commission grant the acceleration request and will include an explanation of the basis for the licensee's acceleration request.

(c) *Commission order.* If the Commission determines it is in the public interest, the Commission will issue an order accelerating the expiration date of the license to not less than five years and 90 days from the date of the Commission order.

§ 16.5 Site access for a competing applicant.

(a) *Access.* If a potential applicant for a new license, subsequent license, or nonpower license for a project has complied with the first stage consultation provisions of §16.8(b)(1) and has notified the existing licensee in writing of the need for and extent of the access required, the existing licensee must allow the potential applicant to enter upon or into designated land, buildings, or other property in the project area at a reasonable time and under reasonable conditions, including, but not limited to, reasonable liability conditions, conditions for compensation to the existing licensee for all reasonable costs incurred in providing access, including energy generation lost as a result of modification of project operations that may be necessary to provide access, and in a manner that will not adversely affect the environment, for the purposes of:

(1) Conducting a study or gathering information required by a resource agency under §16.8 or by the Commission pursuant to §4.32 of this chapter;

(2) Conducting a study or gathering information not covered by paragraph (a)(1) but necessary to prepare an application for new license, subsequent license, or nonpower license; or

(3) Holding a site visit for a resource agency under §16.8.

(b)(1) *Disputes.* Except as specified by paragraph (b)(2), disputes regarding the timing and conditions of access for the purposes specified in paragraphs (a) (1), (2), or (3) of this section and the need for the studies or information specified in paragraph (a)(2) may be referred to the Director of the Office of Energy Projects for resolution in the manner specified in §16.8(b)(5) prior to the providing of access.

(2) Disputes regarding the amount of compensation to be paid the existing licensee for access may be referred to the Director of the Office of Energy Projects for resolution in the manner specified in §16.8(b)(5) after the access has been provided.

Subpart B—Applications for Projects Subject to Sections 14 and 15 of the Federal Power Act

§16.6 Notification procedures under section 15 of the Federal Power Act.

(a) *Applicability.* This section applies to a licensee of an existing project subject to sections 14 and 15 of the Federal Power Act.

(b) *Requirement to notify.* In order to notify the Commission under section 15 of the Federal Power Act whether a licensee intends to file or not to file an application for new license, the licensee must file with the Commission an original and fourteen copies of a letter, that contains the following information:

(1) The licensee's name and address.

(2) The project number.

(3) The license expiration date.

(4) An unequivocal statement of the licensee's intention to file or not to file an application for a new license.

(5) The type of principal project works licensed, such as dam and reservoir, powerhouse, or transmission lines.

(6) Whether the application is for a power or nonpower license.

(7) The location of the project by state, county and stream, and, when appropriate, by city or nearby city.

(8) The installed plant capacity.

(9) The location or locations of all the sites where the information required under §16.7 is available to the public.

(10) The names and mailing addresses of:

(i) Every county in which any part of the project is located, and in which any Federal facility that is used by the project is located;

(ii) Every city, town, or similar local political subdivision:

(A) In which any part of the project is located and any Federal facility that is used by the project is located, or

(B) That has a population of 5,000 or more people and is located within 15 miles of the project dam,

(iii) Every irrigation district, drainage district, or similar special purpose political subdivision:

(A) In which any part of the project is located and any Federal facility that is used by the project is located, or

(B) That owns, operates, maintains, or uses any project facility or any Federal facility that is used by the project;

(iv) Every other political subdivision in the general area of the project that there is reason to believe would be likely to be interested in, or affected by, the notification;

(v) Affected Indian tribes.

(c) *When to notify.* (1) Except as provided in paragraph (c)(2) of this section, if a license expires on or after October 17, 1992, the licensee must notify the Commission as required in paragraph (b) of this section at least five years, but no more than five and one-half years, before the existing license expires.

(2) The requirement in paragraph (c)(1) of this section does not apply if a licensee filed notice more than five and one-half years before its existing license expired and before the effective date of this rule.

(d) *Commission notice.* Upon receipt of the notification required under paragraph (c) of this Section, the Commission will provide notice of the licensee's intent to file or not to file an application for a new license by:

(1) If the notification is filed prior to July 23, 2005;

(i) Publishing notice in the FEDERAL REGISTER;

(ii) Publishing notice once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying the appropriate Federal and state resource agencies, state water quality and coastal zone management consistency certifying agencies, and Indian tribes, by electronic means if practical, otherwise by mail.

(2) If the notification is filed on or after July 23, 2005, pursuant to the provisions of §5.8 of this chapter.

[Order 496, 53 FR 15810, May 4, 1988. Redesignated and amended by Order 513, 54 FR 23807, June 2, 1989; Order 2002, 68 FR 51139, Aug. 25, 2003; Order 653, 70 FR 8724, Feb. 23, 2005]

§16.7 Information to be made available to the public at the time of notification of intent under section 15(b) of the Federal Power Act.

(a) *Applicability*. This section applies to a licensee of an existing project subject to sections 14 and 15 of the Federal Power Act.

(b) *Requirement to make information available*. A licensee must make the information specified in paragraph (d) of this section reasonably available to the public for inspection and reproduction, from the date on which the licensee notifies the Commission pursuant to §16.6(b) of this part until the date any relicensing proceeding for the project is terminated.

(c) *Requirement to supplement information*. A licensee must supplement the information it is required to make available under the provisions of paragraph (d) with any additional information developed after the filing of a notice of intent.

(d) *Information to be made available*. (1) A licensee for which the deadline for filing a notification of intent to seek a new or subsequent license is on or after July 23, 2005 must, at the time it files a notification of intent to seek a license pursuant to §5.5 of this chapter, provide a copy of the pre-application document required by §5.6 of this chapter to the entities specified in that paragraph.

(2) A licensee for which the deadline for filing a notification of intent to seek a new or subsequent license is prior to July 23, 2005, and which elects to seek a license pursuant to this part must make the following information regarding its existing project reasonably available to the public as provided in paragraph (b) of this section:

(i) The following construction and operation information:

(A) The original license application and the order issuing the license and any subsequent license application and subsequent order issuing a license for the existing project, including

(*1*) Approved Exhibit drawings, including as-built exhibits,

(*2*) Any order issuing amendments or approving exhibits,

(*3*) Any order issuing annual licenses for the existing project;

(B) All data relevant to whether the project is and has been operated in accordance with the requirements of each license article, including minimum flow requirements, ramping rates, reservoir elevation limitations, and environmental monitoring data;

(C) A compilation of project generation and respective outflow with time increments not to exceed one hour, unless use of another time increment can be justified, for the period beginning five years before the filing of a notice of intent;

(D) Any public correspondence related to the existing project;

(E) Any report on the total actual annual generation and annual operation and maintenance costs for the period beginning five years before the filing of a notice of intent;

(F) Any reports on original project costs, current net investment, and available funds in the amortization reserve account;

(G) A current and complete electrical single-line diagram of the project showing the transfer of electricity from the project to the area utility system or point of use; and

(H) Any bill issued to the existing licensee for annual charges under Section 10(e) of the Federal Power Act.

(ii) The following safety and structural adequacy information:

(A) The most recent emergency action plan for the project or a letter exempting the project from the emergency action plan requirement;

(B) Any independent consultant's reports required by part 12 of this chapter and filed on or after January 1, 1981;

(C) Any report on operation or maintenance problems, other than routine maintenance, occurring within the five years preceding the filing of a notice of intent or within the most recent five-year period for which data exists, and associated costs of such problems under the Commission's Uniform System of Accounts;

(D) Any construction report for the existing project; and

(E) Any public correspondence relating to the safety and structural adequacy of the existing project.

(iii) The following fish and wildlife resources information:

(A) Any report on the impact of the project's construction and operation on fish and wildlife resources;

(B) Any existing report on any threatened or endangered species or critical habitat located in the project area, or affected by the existing project outside the project area;

(C) Any fish and wildlife management plan related to the project area prepared by the existing licensee or any resource agency; and

(D) Any public correspondence relating to the fish and wildlife resources within the project area.

(iv) The following recreation and land use resources information:

(A) Any report on past and current recreational uses of the project area;

(B) Any map showing recreational facilities and areas reserved for future development in the project area, designated or proposed wilderness areas in the project area; Land and Water Conservation Fund lands in the project area, and designated or proposed Federal or state wild and scenic river corridors in the project area.

(C) Any documentation listing the entity responsible for operating and maintaining any existing recreational facilities in the project area; and

(D) Any public correspondence relating to recreation and land use resources within the project area.

(v) The following cultural resources information:

(A) Except as provided in paragraph (d)(2)(v)(B) of this section, a licensee must make available:

(*1*) Any report concerning documented archeological resources identified in the project area;

(*2*) Any report on past or present use of the project area and surrounding areas by Native Americans; and

(*3*) Any public correspondence relating to cultural resources within the project area.

(B) A licensee must delete from any information made available under paragraph (d)(2)(v)(A) of this section, specific site or property locations the disclosure of which would create a risk of harm, theft, or destruction of archeological or Native American cultural resources or to the site at which the resources are located, or would violate any Federal law, including the Archeological Resources Protection Act of 1979, 16 U.S.C. 470w–3, and the National Historic Preservation Act of 1966, 16 U.S.C. 470hh.

(vi) The following energy conservation information under section 10(a)(2)(C) of the Federal Power Act related to the licensee's efforts to conserve electricity or to encourage conservation by its customers including:

(A) Any plan of the licensee;

(B) Any public correspondence; and

(C) Any other pertinent information relating to a conservation plan.

(3)–(6) [Reserved]

(7)(i) If paragraph (d) of this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined in §388.113(c) of this chapter, to any person, the applicant shall omit the CEII from the information made available and insert the following in its place:

(A) A statement that CEII is being withheld;

(B) A brief description of the omitted information that does not reveal any CEII; and

(C) This statement: ''Procedures for obtaining access to Critical Energy Infrastructure Information (CEII) may be found at 18 CFR 388.113. Requests for access to CEII should be made to the Commission's CEII Coordinator.''

(ii) The applicant, in determining whether information constitutes CEII, shall treat the information in a manner consistent with any filings that applicant has made with the Commission and shall to the extent practicable adhere to any previous determinations by the Commission or the CEII Coordinator involving the same or like information.

(iii) The procedures contained in §§388.112 and 388.113 of this chapter regarding designation of, and access to, CEII, shall apply in the event of a challenge to a CEII designation or a request for access to CEII. If it is determined that information is not CEII or that a requester should be granted access to CEII, the applicant will be directed to make the information available to the requester.

(iv) Nothing in this section shall be construed to prohibit any persons from voluntarily reaching arrangements or agreements calling for the disclosure of CEII.

(e) *Form, place, and hours of availability, and cost of reproduction.* (1) A licensee must make the information specified in paragraph (d) of this section, or the pre-application document, as applicable, available to the public for inspection:

(i) At its principal place of business or at any other location or locations that are more accessible to the public, provided that all of the information is available in at least one location;

(ii) During regular business hours; and

(iii) In a form that is readily accessible, reviewable, and reproducible.

(2) Except as provided in paragraph (d)(3) of this section, a licensee must make requested copies of the information specified in paragraph (c) of this section available either:

(i) At its principal place of business or at any other location or locations that are more accessible to the public, after obtaining reimbursement for reasonable costs of reproduction; or

(ii) Through the mail, after obtaining reimbursement for postage fees and reasonable costs of reproduction.

(3) A licensee must make requested copies of the information specified in paragraph (d) of this section available to the United States Fish and Wildlife Service, the National Marine Fisheries Service, Indian tribes, and the state agency responsible for fish and wildlife resources without charge for the costs of reproduction or postage.

(f) *Unavailability of required information.* Anyone may file a petition with the Commission requesting access to the information specified in paragraph (d) of this section if it believes that a licensee is not making the information reasonably available for public inspection or reproduction. The petition must describe in detail the basis for the petitioner's belief.

(g) *Public correspondence.* A licensee may compile and make available in one file all the public correspondence required to be made available for inspection and reproduction by §16.7(d)(1)(iv), (d)(2)(v), (d)(3)(iv), (d)(4)(iv), and (d)(6)(ii).

[Order 496, 53 FR 15810, May 4, 1988. Redesignated by Order 513, 54 FR 23807, June 2, 1989; Order 513–C, 55 FR 10768, Mar. 23, 1990; Order 2002, 68 FR 51139, Aug. 25, 2003; Order 643, 68 FR 52095, Sept. 2, 2003]

§16.8 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files any application for a new license, a nonpower license, an exemption from licensing, or, pursuant to §16.25 or §16.26 of this part, a surrender of a project, a potential applicant must consult with the relevant Federal, State, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands or facilities utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate State water resource management agencies, the certifying agency under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341(c)(1), and any Indian tribe that may be affected by the project.

(2) Each requirement in this section to contact or consult with resource agencies or Indian tribes shall require as well that the potential Applicant contact or consult with members of the public.

(3) If the potential applicant for a new or subsequent license commences first stages pre-filing consultation under this part on or after July 23, 2005, it must file a notification of intent to file a license application pursuant to §5.5 of this chapter and a pre-application document pursuant to the provisions of §5.6 of this chapter.

(4) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, and Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(5)(i) Before it files an amendment that would be considered as material under §4.35 of this part, to any application subject to this section, an applicant must consult with the resource agencies and Indian tribes listed in paragraph (a)(1) of this section and allow such agencies and tribes at least 60 days to comment on a draft of the proposed amendment and to submit recommendations and conditions to the applicant. The amendment as filed with the Commission must summarize the consultation with the resource agencies and Indian tribes on the proposed amendment and respond to any obligations, recommendations or conditions submitted by the agencies or Indian tribes.

(ii) If an applicant has any doubt as to whether a particular amendment would be subject to the pre-filing consultation requirements of this section, the applicant may file a written request for clarification with the Director, Office of Energy Projects.

(b) *First stage of consultation.* (1) A potential Applicant for a new or subsequent license must, at the time it files its notification of intent to seek a license pursuant to §5.5 of this chapter, provide a copy of the pre-application document required by §5.6 of this chapter to the entities specified in §5.6(a) of this chapter.

(2) A potential applicant for a nonpower license or exemption or a potential applicant which elects to use the licensing procedures of Parts 4 or 16 of this chapter prior to July 23, 2005, must promptly contact each of the appropriate resource agencies, Indian tribes, and members of the public listed in paragraph (a)(1) of this section, and the Commission with the following information:

(i) Detailed maps showing existing project boundaries, if any, proper land descriptions of the entire project area by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of all existing and proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(ii) A general engineering design of the existing project and any proposed changes, with a description of any existing or proposed diversion of a stream through a canal or penstock;

(iii) A summary of the existing operational mode of the project and any proposed changes;

(iv) Identification of the environment affected or to be affected, the significant resources present and the applicant's existing and proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time;

(v) Streamflow and water regime information, including drainage area, natural flow periodicity, monthly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the point of diversion or impoundment, with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations;

(vi) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and

(vii) Any statement required by §4.301(a) of this chapter.

(3)(i) A potential applicant for an exemption, a new or subsequent license for which the deadline for filing a notification of intent to seek a license is prior to July 23, 2005 and which elects to commence pre-filing consultation under this part, or a new or subsequent license for which the deadline for filing a notification of intent to seek a license is on or after July 23, 2005 and which receives Commission approval to

use the license application procedures of this part must:

(A) Hold a joint meeting, including an opportunity for a site visit, with all pertinent agencies, Indian tribes and members of the public to review the information and to discuss the data and studies to be provided by the potential applicant as part of the consultation process; and

(B) Consult with the resource agencies, Indian tribes and members of the public on the scheduling of the joint meeting; and provide each resource agency, Indian tribe, member of the public, and the Commission with written notice of the time and place of the joint meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(ii) The joint meeting must be held no earlier than 30 days, and no later than 60 days from, as applicable:

(A) The date of the potential applicant's letter transmitting the information required by paragraph (b)(2) of this section, in the case of a potential exemption applicant or a potential license applicant that commences prefiling consultation under this part prior to July 23, 2005; or

(B) The date of the Commission's approval of the potential license applicant's request to use the license application procedures of this part pursuant to the provisions of part 5, in the case of a potential license applicant for which the deadline for filing a notification of intent to seek a license is on or after July 23, 2005.

(4) Members of the public are invited to attend the joint meeting held pursuant to paragraph (b)(3) of this section. Members of the public attending the meeting are entitled to participate fully in the meeting and to express their views regarding resource issues that should be addressed in any application for a new license that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(3) of this section shall be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must upon request promptly provide copies of these recordings or transcripts to the Commission and any resource agency and Indian tribe.

(5) Unless otherwise extended by the Director of Office of Energy Projects pursuant to paragraph (b)(6) of this section, not later than 60 days after the joint meeting held under paragraph (b)(3) of this section each interested resource agency, and Indian tribe, and member of the public must provide a potential applicant with written comments:

(i) Identifying its determination of necessary studies to be performed or information to be provided by the potential applicant;

(ii) Identifying the basis for its determination;

(iii) Discussing its understanding of the resource issues and its goals objectives for these resources;

(iv) Explaining why each study methodology recommended by it is more appropriate than any other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(2)(vi) of this section;

(v) Documenting that the use of each study methodology recommended by it is a generally accepted practice; and

(vi) Explaining how the studies and information requested will be useful to the agency, Indian tribe, or member of the public in furthering its resource goals and objectives.

(6)(i) If a potential applicant and a resource agency, Indian tribe, or member of the public disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency, or Indian tribe, or member of the public may refer the dispute in writing to the Director of the Office of Energy Projects (Director) for resolution.

(ii) The entity referring the dispute must serve a copy of its written request for resolution on the disagreeing party at the time the request is submitted to the Director. The disagreeing party may submit to the Director a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director and written responses thereto pursuant to paragraphs (b)(6)(i) or (b)(6)(ii) of this section must be filed with the Secretary of the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director of the Office of Energy Projects pursuant to §16.8(b)(6).

(iv) The Director will resolve disputes by an order directing the potential applicant to gather such information or conduct such study or studies as, in the Director's view, is reasonable and necessary.

(v) If a resource agency, Indian tribe, or member of the public fails to refer a dispute regarding a request for a potential applicant to obtain information or conduct studies (other than a dispute regarding the information specified in paragraph (b)(1) or (b)(2) of this section, as applicable), the Commission will not entertain the dispute following the filing of the license application.

(vi) If a potential applicant fails to obtain information or conduct a study as required by the Director pursuant to paragraph (b)(6)(iv) of this section, its application will be considered deficient.

(7) Unless otherwise extended by the Director pursuant to paragraph (b)(6) of this section, the first stage of consultation ends when all participating agencies, Indian tribes, and members of the public provide the written comments required under paragraph (b)(5) of this section or 60 days after the joint meeting held under paragraph (b)(3) of this section, whichever occurs first.

(c) *Second stage of consultation.* (1) Unless determined otherwise by the Director of the Office of Energy Projects pursuant to paragraph (b)(6) of this section, a potential applicant must complete all reasonable and necessary studies and obtain all reasonable and necessary information requested by resource agencies and Indian tribes under paragraph (b):

(i) Prior to filing the application, if the results:

(A) Would influence the financial (e.g., instream flow study) or technical feasibility of the project (e.g., study of potential mass soil movement); or

(B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (e.g., resource surveys), suitable mitigation or enhancement measures, or to minimize impact on significant resources (e.g., wild and scenic river, anadromous fish, endangered species, caribou migration routes);

(ii) After filing the application but before license issuance, if the applicant complied with the provisions of paragraph (b)(1) or (b)(2) of this section, as applicable, no later than four years prior to the expiration date of the existing license and the results:

(A) Would be those described in paragraphs (c)(1)(i) (A) or (B) of this section; and

(B) Would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the new license application filing deadline.

(iii) After a new license is issued, if the studies can be conducted or the information obtained only after construction or operation of proposed facilities, would determine the success of protection, mitigation, or enhancement measures (e.g., post-construction monitoring studies), or would be used to refine project operation or modify project facilities.

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(7) of this section, a resource agency, Indian tribe, or member of the public requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis for its request, under paragraphs (b)(5)(i)–(vi) of this section, the potential applicant will promptly initiate the study or gather the information, unless the Director of the Office of Energy Projects determines under paragraph (b)(5) of this section either that the study or information is unreasonable or unnecessary or that use of the methodology requested by a resource agency or Indian tribe for conducting the study is not a generally accepted practice.

(3) (i) The results of studies and information gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this

section will be treated as additional information; and

(ii) Filing and acceptance of an application will not be delayed and an application will not be considered deficient or patently deficient pursuant to §4.32 (e)(1) or (e)(2) of this chapter merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency and Indian tribe with:

(i) A copy of its draft application that:

(A) Indicates the type of application the potential applicant expects to file with the Commission; and

(B) Responds to any comments and recommendations made by any resource agency or Indian tribe either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information gathering either requested by that resource agency or Indian tribe in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertains to resources of interest to that resource agency or Indian tribe and which were identified by the potential applicant pursuant to paragraph (b)(2)(vi) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measure; and

(iii) A written request for review and comment.

(5) A resource agency or Indian tribe will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) of this section information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency or Indian tribe has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold at least one joint meeting with the disagreeing resource agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the disagreeing agency's or Indian tribe's written comments to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures; and

(ii) Consult with the disagreeing agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility on the scheduling of the joint meeting and provide the disagreeing resource agency or Indian tribe, other agencies with similar or related areas of interest, expertise, or responsibility, and the Commission with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(7) The potential applicant and any disagreeing resource agency or Indian tribe may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency or Indian tribe on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency or Indian tribe, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) A potential applicant may file an application with the Commission if:

(i) It has complied with paragraph (c)(4) of this section and no resource agency or Indian tribe has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section if any resource agency or Indian tribe has responded with substantive disagreements.

(10) The second stage of consultation ends:

(i) Ninety days after the submittal of information pursuant to paragraph

(c)(4) of this section in cases where no resource agency or Indian tribe has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in cases where a resource agency or Indian tribe has responded with substantive disagreements.

(d) *Third stage of consultation.* (1) The third stage of consultation is initiated by the filing of an application for a new license, nonpower license, exemption from licensing, or surrender of license, accompanied by a transmittal letter certifying that at the same time copies of the application are being distributed to the resource agencies, Indian tribes, and other government offices specified in paragraph (d)(2) of this section and § 16.10(f) of this part, if applicable.

(2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct, the applicant must serve on every resource agency and Indian tribe consulted, on other government offices, and, in the case of applications for surrender or nonpower license, any state, municipal, interstate, or Federal agency which is authorized to assume regulatory supervision over the land, waterways, and facilities covered by the application for surrender or nonpower license, copies of:

(i) Its application for a new license, a nonpower license, an exemption from licensing, or a surrender of the project;

(ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

(e) *Resource agency or Indian tribe waiver of compliance with consultation requirement.* (1) If a resource agency or Indian tribe waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency or Indian tribe.

(2) If a resource agency or Indian tribe fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency or Indian tribe to comply.

(3) The failure of a resource agency or Indian tribe to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(4) Following July 23, 2003 a potential license applicant engaged in pre-filing consultation under this part may during first stage consultation request to incorporate into pre-filing consultation any element of the integrated license application process provided for in part 5 of this chapter. Any such request must be accompanied by a:

(i) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and

(ii) Demonstration that the potential license applicant has made every reasonable effort to contact all resource agencies, Indian tribes, non-governmental organizations, and others affected by the potential applicant's proposal, and that a consensus exists in favor of incorporating the specific element of the part 5 process into the pre-filing consultation under this part.

(f) *Application requirements documenting consultation and any disagreements with resource agencies or Indian tribes.* An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) of this section, and § 16.8(i), and must include:

(1) Any resource agency's or Indian tribe's letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreement with a resource agency or Indian tribe on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement, and

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency or Indian tribe.

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency or Indian tribe, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;

(6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in §2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan;

(7) A description of how the applicant's proposal addresses the significant resource issues raised by members of the public during the joint meeting held pursuant to paragraph (b)(2) of this section.

(g) *Requests for privileged treatment of pre-filing submission.* If a potential applicant requests privileged treatment of any information submitted to the Commission during pre-filing consultation (except for the information specified in paragraph (b)(1) of this section), the Commission will treat the request in accordance with the provisions in §388.112 of this chapter until the date the application is filed with the Commission.

(h) *Other meetings.* Prior to holding a meeting with a resource agency or Indian tribe, other than a joint meeting pursuant to paragraph (b)(3)(i) or (c)(6)(i) of this section, a potential applicant must provide the Commission and each resource agency or Indian tribe (with an area of interest, expertise, or responsibility similar or related to that of the resource agency or Indian tribe with which the potential applicant is to meet) with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(i) *Public participation.* (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(3), the potential applicant must publish notice, at least once, of the purpose, location, and timing of the joint meeting, in a daily or weekly newspaper published in the county or counties in which the existing project or any part thereof or the lands affected thereby are situated. The notice shall include a copy of the written agenda of the issues to be discussed at the joint meeting prepared pursuant to paragraph (b)(3)(ii) of this section.

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (i)(1) of this section is first published until a final order is issued on the license application.

(ii) The provisions of §16.7(e) shall govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(3) of this section the information specified in paragraph (b)(2) of this section.

(j) *Critical Energy Infrastructure Information.* If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §16.7(d)(7).

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 513–A, 55 FR 16, Jan. 2, 1990; Order 533, 56 FR 23154, May 20, 1991; 56 FR 61156, Dec. 2, 1991; Order 2002, 68 FR 51140, Aug. 25, 2003; Order 643, 68 FR 52095, Sept. 2, 2003; 68 FR 61743, Oct. 30, 2003]

§16.9 Applications for new licenses and nonpower licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an applicant for a new license or nonpower license for a project subject to sections 14 and 15 of the Federal Power Act.

(b) *Filing requirement.* (1) An applicant for a license under this section must file its application at least 24 months before the existing license expires.

(2) An application for a license under this section must meet the requirements of §4.32 (except that the Director of the Office of Energy Projects may provide more than 90 days in which to correct deficiencies in applications) and, as appropriate, §§4.41, 4.51, or 4.61 of this chapter.

(3) The requirements of §4.35 of this chapter do not apply to an application under this section, except that the Commission will reissue a public notice of the application in accordance with the provisions of §16.9(d)(1) if an amendment described in §4.35(f) of this chapter is filed.

(4) If the Commission rejects or dismisses an application pursuant to the provisions of §4.32 of this chapter, the application may not be refiled after the new license application filing deadline specified in §16.9(b)(1).

(c) *Final amendments.* All amendments to an application, including the final amendment, must be filed with the Commission and served on all competing applicants no later than the date specified in the notice issued under paragraph (d)(2).

(d) *Commission notice.* (1) Upon acceptance of an application for a new license or a nonpower license, the Commission will give notice of the application and of the dates for comment, intervention, and protests by:

(i) Publishing notice in the FEDERAL REGISTER;

(ii) Publishing notice once every week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated; and

(iii) Notifying appropriate Federal, state, and interstate resource agencies, Indian tribes, and non-governmental organizations, by electronic means if practical, otherwise by mail.

(2) Within 60 days after the new license application filing deadline, the Commission will issue a notice on the processing deadlines established under §4.32 of this chapter, estimated dates for further processing deadlines under §4.32 of this chapter, deadlines for complying with the provisions of §4.36(d)(2)(ii) and (iii) of this chapter in cases where competing applications are filed, and the date for final amendments and will:

(i) Publish the notice in the FEDERAL REGISTER;

(ii) Provide the notice to appropriate Federal, state, and interstate resource agencies and Indian tribes, by electronic means if practical, otherwise by mail; and

(iii) Serve the notice on all parties to the proceedings pursuant to §385.2010 of this chapter.

(3) Where two or more mutually exclusive competing applications have been filed for the same project, the final amendment date and deadlines for complying with the provisions of §4.36(d)(2)(ii) and (iii) of this chapter established pursuant to the notice issued under paragraph (d)(2) of this section will be the same for all such applications.

(4) The provisions of §4.36(d)(2)(i) of this chapter will not be applicable to applications filed pursuant to this section.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 2002, 68 FR 51142, Aug. 25, 2003; Order 653, 70 FR 8724, Feb. 23, 2005]

§16.10 Information to be provided by an applicant for new license: Filing requirements.

(a) *Information to be supplied by all applicants.* All applicants for a new license under this part must file the following information with the Commission:

(1) A discussion of the plans and ability of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service, including efforts and plans to:

(i) Increase capacity or generation at the project;

(ii) Coordinate the operation of the project with any upstream or downstream water resource projects; and

(iii) Coordinate the operation of the project with the applicant's or other electrical systems to minimize the cost of production.

(2) A discussion of the need of the applicant over the short and long term for the electricity generated by the project, including:

(i) The reasonable costs and reasonable availability of alternative sources

of power that would be needed by the applicant or its customers, including wholesale customers, if the applicant is not granted a license for the project;

(ii) A discussion of the increase in fuel, capital, and any other costs that would be incurred by the applicant or its customers to purchase or generate power necessary to replace the output of the licensed project, if the applicant is not granted a license for the project;

(iii) The effect of each alternative source of power on:

(A) The applicant's customers, including wholesale customers;

(B) The applicant's operating and load characteristics; and

(C) The communities served or to be served, including any reallocation of costs associated with the transfer of a license from the existing licensee.

(3) The following data showing need and the reasonable cost and availability of alternative sources of power:

(i) The average annual cost of the power produced by the project, including the basis for that calculation;

(ii) The projected resources required by the applicant to meet the applicant's capacity and energy requirements over the short and long term including:

(A) Energy and capacity resources, including the contributions from the applicant's generation, purchases, and load modification measures (such as conservation, if considered as a resource), as separate components of the total resources required;

(B) A resource analysis, including a statement of system reserve margins to be maintained for energy and capacity; and

(C) If load management measures are not viewed as resources, the effects of such measures on the projected capacity and energy requirements indicated separately;

(iii) For alternative sources of power, including generation of additional power at existing facilities, restarting deactivated units, the purchase of power off-system, the construction or purchase and operation of a new power plant, and load management measures such as conservation:

(A) The total annual cost of each alternative source of power to replace project power;

(B) The basis for the determination of projected annual cost; and

(C) A discussion of the relative merits of each alternative, including the issues of the period of availability and dependability of purchased power, average life of alternatives, relative equivalent availability of generating alternatives, and relative impacts on the applicant's power system reliability and other system operating characteristics; and

(iv) The effect on the direct providers (and their immediate customers) of alternate sources of power.

(4) If an applicant uses power for its own industrial facility and related operations, the effect of obtaining or losing electricity from the project on the operation and efficiency of such facility or related operations, its workers, and the related community.

(5) If an applicant is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation.

(6) A comparison of the impact on the operations and planning of the applicant's transmission system of receiving or not receiving the project license, including:

(i) An analysis of the effects of any resulting redistribution of power flows on line loading (with respect to applicable thermal, voltage, or stability limits), line losses, and necessary new construction of transmission facilities or upgrading of existing facilities, together with the cost impact of these effects;

(ii) An analysis of the advantages that the applicant's transmission system would provide in the distribution of the project's power; and

(iii) Detailed single-line diagrams, including existing system facilities identified by name and circuit number, that show system transmission elements in relation to the project and other principal interconnected system elements. Power flow and loss data that represent system operating conditions may be appended if applicants believe such data would be useful to show that the operating impacts described would be beneficial.

(7) If the applicant has plans to modify existing project facilities or operations, a statement of the need for, or usefulness of, the modifications, including at least a reconnaissance-level study of the effect and projected costs of the proposed plans and any alternate plans, which in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in section 10(a)(1) of the Federal Power Act.

(8) If the applicant has no plans to modify existing project facilities or operations, at least a reconnaissance-level study to show that the project facilities or operations in conjunction with other developments in the area would conform with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in section 10(a)(1) of the Federal Power Act.

(9) A statement describing the applicant's financial and personnel resources to meet its obligations under a new license, including specific information to demonstrate that the applicant's personnel are adequate in number and training to operate and maintain the project in accordance with the provisions of the license.

(10) If an applicant proposes to expand the project to encompass additional lands, a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

(11) The applicant's electricity consumption efficiency improvement program, as defined under section 10(a)(2)(C) of the Federal Power Act, including:

(i) A statement of the applicant's record of encouraging or assisting its customers to conserve electricity and a description of its plans and capabilities for promoting electricity conservation by its customers; and

(ii) A statement describing the compliance of the applicant's energy conservation programs with any applicable regulatory requirements.

(12) The names and mailing addresses of every Indian tribe with land on which any part of the proposed project would be located or which the applicant reasonably believes would otherwise be affected by the proposed project.

(b) *Information to be provided by an applicant who is an existing licensee.* An existing licensee that applies for a new license must provide:

(1) The information specified in paragraph (a).

(2) A statement of measures taken or planned by the licensee to ensure safe management, operation, and maintenance of the project, including:

(i) A description of existing and planned operation of the project during flood conditions;

(ii) A discussion of any warning devices used to ensure downstream public safety;

(iii) A discussion of any proposed changes to the operation of the project or downstream development that might affect the existing Emergency Action Plan, as described in subpart C of part 12 of this chapter, on file with the Commission;

(iv) A description of existing and planned monitoring devices to detect structural movement or stress, seepage, uplift, equipment failure, or water conduit failure, including a description of the maintenance and monitoring programs used or planned in conjunction with the devices; and

(v) A discussion of the project's employee safety and public safety record, including the number of lost-time accidents involving employees and the record of injury or death to the public within the project boundary.

(3) A description of the current operation of the project, including any constraints that might affect the manner in which the project is operated.

(4) A discussion of the history of the project and record of programs to upgrade the operation and maintenance of the project.

(5) A summary of any generation lost at the project over the last five years because of unscheduled outages, including the cause, duration, and corrective action taken.

(6) A discussion of the licensee's record of compliance with the terms

and conditions of the existing license, including a list of all incidents of noncompliance, their disposition, and any documentation relating to each incident.

(7) A discussion of any actions taken by the existing licensee related to the project which affect the public.

(8) A summary of the ownership and operating expenses that would be reduced if the project license were transferred from the existing licensee.

(9) A statement of annual fees paid under Part I of the Federal Power Act for the use of any Federal or Indian lands included within the project boundary.

(c) *Information to be provided by an applicant who is not an existing licensee.* An applicant that is not an existing licensee must provide:

(1) The information specified in paragraph (a).

(2) A statement of the applicant's plans to manage, operate, and maintain the project safely, including:

(i) A description of the differences between the operation and maintenance procedures planned by the applicant and the operation and maintenance procedures of the existing licensee;

(ii) A discussion of any measures proposed by the applicant to implement the existing licensee's Emergency Action Plan, as described in subpart C of part 12 of this chapter, and any proposed changes;

(iii) A description of the applicant's plans to continue safety monitoring of existing project instrumentation and any proposed changes; and

(iv) A statement indicating whether or not the applicant is requesting the licensee to provide transmission services under section 15(d) of the Federal Power Act.

(d) *Inclusion in application.* The information required to be provided by this section must be included in the application as a separate exhibit labeled ''Exhibit H.''

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 533, 56 FR 23154, May 20, 1991; 56 FR 61156, Dec. 2, 1991; Order 2002, 68 FR 51142, Aug. 25, 2003]

§ 16.11 Nonpower licenses.

(a) *Information to be provided by all applicants for nonpower licenses.* (1) An applicant for a nonpower license must provide the following information in its application:

(i) The information required by §§ 4.51 or 4.61 of this chapter, as appropriate;

(ii) A description of the nonpower purpose for which the project is to be used;

(iii) A showing of how the nonpower use conforms with a comprehensive plan for improving or developing the waterway and for other beneficial public uses as defined in section 10(a)(1) of the Federal Power Act;

(iv) A statement of any impact that converting the project to nonpower use may have on the power supply of the system served by the project, including the additional cost of power if an alternative generating source is used to offset the loss of the project's generation;

(v) A statement identifying the state, municipal, interstate, or Federal agency, which is authorized and willing to assume regulatory supervision over the land, waterways, and facilities to be included within the nonpower project;

(vi) Copies of written communication and documentation of oral communication that the applicant may have had with any jurisdictional agency or governmental unit authorized and willing to assume regulatory control over the project and the point of time at which the agency or unit would assume regulatory control;

(vii) A statement that demonstrates that the applicant has complied with the requirements of § 16.8(d)(2);

(viii) A proposal that shows the manner in which the applicant plans to remove or otherwise dispose of the project's power facilities;

(ix) Any proposal to repair or rehabilitate any nonpower facilities;

(x) A statement of the costs associated with removing the project's power facilities and with any necessary restoration and rehabilitation work; and

(xi) A statement that demonstrates that the applicant has resources to ensure the integrity and safety of the remaining project facilities and to maintain the nonpower functions of the project until the governmental unit or agency assumes regulatory control over the project.

(2) [Reserved]

(b) *Termination of a proceeding for a nonpower license.* The Commission may deny an application for a nonpower license and turn the project over to any agency that has jurisdiction over the land or reservations if:

(1) An existing project is located on public lands or reservations of the United States;

(2) Neither the existing licensee nor any other entity has filed an application for a new license for the project;

(3) No one has filed a recommendation to take over the project pursuant to §16.14; and

(4) The agency that has jurisdiction over the land or reservations demonstrates that it is able and willing to:

(i) Accept immediate responsibility for the nonpower use of the project; and.

(ii) Pay the existing licensee for its net investment in the project and any severance damages specified in section 14(a) of the Federal Power Act.

(c) *Termination of nonpower license.* A nonpower license will be terminated by Commission order when the Commission determines that a state, municipal, interstate, or Federal agency has jurisdiction over, and is willing to assume regulatory responsibility for, the land, waterways, and facilities included within the nonpower license.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 2002, 68 FR 51142, Aug. 25, 2003]

§16.12 Application for exemption from licensing by a licensee whose license is subject to sections 14 and 15 of the Federal Power Act.

(a) An existing licensee whose license is subject to sections 14 and 15 of the Federal Power Act may apply for an exemption for the project.

(b) An applicant for an exemption under paragraph (a) must meet the requirements of subpart K or subpart J of part 4 of this chapter, and §§16.5, 16.6, 16.7, 16.8, 16.9(b) (1), (2) (except the requirement to comply with §§4.41, 4.51, or 4.61 of this chapter), 16.9(c), 16.10(a), 16.10(b), 16.10(d), and 16.10(e).

(c) The Commission will process an application by an existing licensee for an exemption for the project in accordance with §§16.9(b)(3), 16.9(b)(4), and 16.9(d).

(d) If a license application is filed in competition with an application for exemption filed by the existing licensee, the Commission will decide among the competing applications in accordance with the standards of §16.13 and not in accordance with the provisions of §4.37(d)(2) of this chapter.

§16.13 Standards and factors for issuing a new license.

(a) In determining whether a final proposal for a new license under section 15 of the Federal Power Act is best adapted to serve the public interest, the Commission will consider the factors enumerated in sections 15(a)(2) and (a)(3) of the Federal Power Act.

(b) If there are only insignificant differences between the final applications of an existing licensee and a competing applicant after consideration of the factors enumerated in section 15(a)(2) of the Federal Power Act, the Commission will determine which applicant will receive the license after considering:

(1) The existing licensee's record of compliance with the terms and conditions of the existing license; and

(2) The actions taken by the existing licensee related to the project which affect the public.

(c) An existing licensee that files an application for a new license in conjunction with an entity or entities that are not currently licensees of all or part of the project will not be considered an existing licensee for the purpose of the insignificant differences provision of section 15(a)(2) of the Federal Power Act.

Subpart C—Takeover Provisions for Projects Subject to Sections 14 and 15 of the Federal Power Act

§16.14 Departmental recommendation for takeover.

(a) A Federal department or agency may file a recommendation that the United States exercise its right to take over a hydroelectric power project with a license that is subject to sections 14 and 15 of the Federal Power Act. The recommendation must:

(1) Be filed no earlier than five years before the license expires and no later

than the end of the comment period specified by the Commission in:

(i) A notice of application for a new license, a nonpower license, or an exemption for the project; or

(ii) A notice of an amendment to an application for a new license, a nonpower license, or an exemption;

(2) Be filed in accordance with the formal requirements for filings in subpart T of part 385 of the Commission's regulations and be served on each relevant Federal and state resource agency, all applicants for new license, nonpower license or exemption, and any other party to the proceeding;

(3) Specify the project works that would be taken over by the United States;

(4) Describe the proposed Federal operation of the project, including any plans for its redevelopment, and discuss the manner in which takeover would serve the public interest as fully as non-Federal development and operation;

(5) State whether the agency intends to undertake the operation of the project; and

(6) Include the information required by §§ 4.41, 4.51, or 4.61 of this chapter, as appropriate.

(b) A department or agency that files a takeover recommendation becomes a party to the proceeding.

(c) An applicant or potential applicant for a new license, a nonpower license, or an exemption that involves a takeover recommendation may file a reply to the recommendation, within 120 days from the date the takeover recommendation is filed with the Commission. The reply must be filed with the Commission in accordance with part 385 of the Commission's regulations and a copy of such a reply must be served on the agency recommending the takeover and on any other party to the proceeding.

§ 16.15 Commission recommendation to Congress.

Upon receipt of a recommendation from any Federal department or agency, a proposal of any party, or on the Commission's own motion, and after notice and opportunity for hearing, the Commission may determine that a project may be taken over by the United States, issue an order on its findings and recommendations, and forward a copy to Congress.

§ 16.16 Motion for stay by Federal department or agency.

(a) Within 30 days of the date on which an order granting a new license or exemption is issued, a Federal department or agency that has filed a takeover recommendation under § 16.14 may file a motion under § 385.2010 of this chapter to request a stay of the effective date of the license or exemption order.

(b)(1) If a Federal department or agency files a motion under paragraph (a), the Commission will stay the effective date of the order issuing the license or exemption for two years.

(2) The stay issued under paragraph (b)(1) of this section may be terminated either:

(i) Upon motion of the department or agency that requested the stay; or

(ii) By action of Congress.

(c) The Commission will notify Congress if:

(1) An order granting a stay under paragraph (b)(1) of this section is issued;

(2) Any license or exemption order becomes effective by reason of the termination of a stay; or

(3) Any license or exemption order becomes effective by reason of the expiration of a stay.

(d) The Commission's order granting the license or exemption will automatically become effective:

(1) Thirty days after issuance, if no request for stay is filed, provided that no appeal or rehearing is filed;

(2) When the period of the stay expires; or

(3) When the stay is terminated under paragraph (b)(2) of this section.

§ 16.17 Procedures upon Congressional authorization of takeover.

If Congress authorizes the takeover of a hydroelectric power project as provided under section 14 of the Federal Power Act:

(a) The Commission or the Director of the Office of Energy Projects will notify the existing licensee in writing of the authorization at least two years before the takeover occurs; and

(b) The licensee must present any claim for compensation to the Commission:

(1) Within six months of issuance of the notice of takeover; and

(2) As provided in section 14 of the Federal Power Act.

Subpart D—Annual Licenses for Projects Subject to Sections 14 and 15 of the Federal Power Act

§ 16.18 Annual licenses for projects subject to sections 14 and 15 of the Federal Power Act.

(a) This section applies to projects with licenses subject to sections 14 and 15 of the Federal Power Act.

(b) The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license to allow:

(1) The licensee to continue to operate the project while the Commission reviews any applications for a new license, a nonpower license, an exemption, or a surrender;

(2) The orderly removal of a project, if the United States does not take over a project and no new power or nonpower license or exemption will be issued; or

(3) The orderly transfer of a project to:

(i) The United States, if takeover is elected; or

(ii) A new licensee, if a new power or nonpower license is issued to that licensee.

(c) An annual license issued under this section will be considered renewed automatically without further order of the Commission, unless the Commission orders otherwise.

(d) In issuing an annual license, the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 513–A, 55 FR 18, Jan. 2, 1990; Order 540, 57 FR 21738, May 22, 1992]

Subpart E—Projects With Minor and Minor Part Licenses Not Subject to Sections 14 and 15 of the Federal Power Act

§ 16.19 Procedures for an existing licensee of a minor hydroelectric power project or of a minor part of a hydroelectric power project with a license not subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability*. This section applies to an existing licensee of a minor hydroelectric power project or of a minor part of a hydroelectric power project that is not subject to sections 14 and 15 of the Federal Power Act.

(b) *Notification procedures*. (1) An existing licensee with a minor license or a license for a minor part of a hydroelectric project must file a notice of intent pursuant to §16.6(b).

(2) If the license of an existing licensee expires on or after October 17, 1994, the licensee must notify the Commission as required under §16.6(b) at least five years before the expiration of the existing license.

(3) The Commission will give notice of a licensee's intent to file or not to file an application for a subsequent license in accordance with §16.6(d).

(c) *Requirement to make information available*. (1) Except as provided in paragraph (c)(2) of this section, a licensee must make the information described in §16.7 available to the public for inspection and reproduction when it gives notice to the Commission under paragraph (b).

(2) The requirement of paragraph (c)(1) of this section does not apply if an applicant filed an application for a subsequent license on or before [insert the effective date of the rule].

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 2002, 68 FR 51142, Aug. 25, 2003]

§ 16.20 Applications for subsequent license for a project with an expiring license not subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability*. This section applies to an application for subsequent license for a project with an expiring license that is not subject to sections 14 and 15 of the Federal Power Act.

(b) *Licensing proceeding.* (1) An applicant for a license for a project with an expiring license not subject to sections 14 and 15 of the Federal Power Act must file its application under Part I of the Federal Power Act.

(2) The provisions of section 7(a) of the Federal Power Act do not apply to licensing proceedings involving an application described in paragraph (b)(1).

(c) *Requirement to file.* An applicant must file an application for subsequent license at least 24 months before the expiration of the existing license.

(d) *Requirements for and processing of applications.* An application for subsequent license must meet the requirements of, and will be processed in accordance with, §§16.5, 16.8, 16.9(b)(2), 16.9(b)(3), 16.9(b)(4), 16.9(c), and 16.9(d).

(e) *Applicant notice.* An applicant for subsequent license or exemption that proposes to expand an existing project to encompass additional lands must include in its application a statement that the applicant has notified, by certified mail, property owners on the additional lands to be encompassed by the project and governmental agencies and subdivisions likely to be interested in or affected by the proposed expansion.

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 2002, 68 FR 51142, Aug. 25, 2003]

§ 16.21 Operation of projects with a minor or minor part license not subject to sections 14 and 15 of the Federal Power Act after expiration of a license.

(a) A licensee of a minor or minor part project not subject to sections 14 and 15 of the Federal Power Act that has filed an application for a subsequent license or exemption may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires until the Commission acts on its application.

(b) If the licensee of a minor or minor part project not subject to sections 14 and 15 of the Federal Power Act has not filed an application for a subsequent license or exemption, the Commission may issue an order requiring the licensee to continue to operate its project in accordance with the terms and conditions of the license until the Commission either acts on any applications for subsequent license timely filed by another entity or takes action pursuant to §§16.25 or 16.26.

§ 16.22 Application for an exemption by a licensee with a minor or minor part license for a project not subject to sections 14 and 15 of the Federal Power Act.

(a) *Applicability.* This section applies to an existing licensee with a license for a project not subject to sections 14 and 15 of the Federal Power Act.

(b) *Information requirements.* An applicant for an exemption must meet the requirements of, and will be processed in accordance with, subpart K or subpart J of part 4 of this chapter, and §§16.5, 16.8, 16.9(b)(2) (except the requirement to comply with §§4.41, 4.51, or 4.61 of this chapter), §§16.9(b)(3), 16.9(b)(4), 16.9(c), 16.9(d), and 16.20(c).

(c) *Standard of comparison.* If an application for subsequent license is filed in competition with an application for exemption by an existing licensee, the Commission will decide among competing applications in accordance with the standards of §16.13 and not in accordance with the provisions of §4.37(d)(2) of this chapter.

Subpart F—Procedural Matters

§ 16.23 Failure to file timely notices of intent.

(a) An existing licensee of a water power project with a license subject to sections 14 and 15 of the Federal Power Act that fails to file a notice of intent pursuant to §16.6(b) by the deadlines specified in §16.6(c) shall be deemed to have filed a notice of intent indicating that it does not intend to file an application for new license, nonpower license, or exemption.

(b) An existing licensee of a water power project with a license not subject to sections 14 and 15 of the Federal Power Act that fails to file a notice of intent pursuant to §16.6(b) by the deadlines specified in §16.20(c) shall be deemed to have filed a notice of intent indicating that it does not intend to file an application for subsequent license or exemption.

§ 16.24 Prohibitions against filing applications for new license, nonpower license, exemption, or subsequent license.

(a) *Licenses subject to sections 14 and 15 of the Federal Power Act.* (1) An existing licensee with a license subject to sections 14 and 15 of the Federal Power Act that informs the Commission that it does not intend to file an application for new license, nonpower license, or exemption for a project, as required by §16.6, may not file an application for new license, nonpower license, or exemption for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

(2) An existing licensee with a license subject to sections 14 and 15 of the Federal Power Act that fails to file an application for new license, nonpower license, or exemption for a project at least 24 months before the expiration of the existing license for the project may not file an application for new license, nonpower license, or exemption for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

(b) *Licenses not subject to sections 14 and 15 of the Federal Power Act.* (1) An existing licensee with a license not subject to sections 14 and 15 of the Federal Power Act that informs the Commission that it does not intend to file an application for subsequent license or exemption for a project, as required by §16.6, may not file an application for subsequent license or exemption for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

(2) An existing licensee with a license not subject to sections 14 and 15 of the Federal Power Act that fails to file an application for subsequent license or exemption for a project by the deadlines specified in §16.20(c) may not file an application for subsequent license or exemption for the project, either individually or in conjunction with an entity or entities that are not currently licensees of the project.

§ 16.25 Disposition of a project for which no timely application is filed following a notice of intent to file.

(a) If an existing licensee that indicates in the notice filed pursuant to §16.6 that it will file an application for new license, nonpower license, subsequent license, or an exemption does not file its application individually or in conjunction with an entity or entities that are not currently licensees of the project at least 24 months before its existing license expires in the case of licenses subject to sections 14 and 15 of the Federal Power Act, or by the deadlines specified in §16.20(c) in the case of licenses not subject to sections 14 and 15 of the Federal Power Act, and no other applicant files an application within the appropriate time or all pending applications filed before the applicable filing deadline are subsequently rejected or dismissed pursuant to §4.32 of this chapter, the Commission will publish in the FEDERAL REGISTER and once in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated, notice soliciting applications from potential applicants other than the existing licensee.

(b) A potential applicant that files a notice of intent within 90 days from the date of the public notice issued pursuant to paragraph (a):

(1) May apply for a license under Part I of the Federal Power Act and part 4 of this chapter (except §4.38) within 18 months of the date on which it files its notice; and

(2) Must comply with the requirements of §16.8 and, if the project would have a total installed capacity of over 2,000 horsepower, §16.10.

(c) The existing licensee must file a schedule for the filing of a surrender application for the project, for the approval of the Director of the Office of Energy Projects, 90 days:

(1) After the due date established for any notice of intent issued under paragraph (a), if no notices of intent were received; or

(2) After the due date for any application filed under paragraph (b)(1), if no application has been filed.

(d) Any application for surrender must be filed according to the approved

schedule, must comply with the requirements of §16.8 and part 6 of this chapter, and must provide for disposition of any project facility.

§ 16.26 Disposition of a project for which no timely application is filed following a notice of intent not to file.

(a) If an existing licensee indicates in the notice filed pursuant to §16.6 that it will not file an application for new license, nonpower license, subsequent license, or exemption and no other applicant files an application at least 24 months before the existing license expires in the case of licenses subject to sections 14 and 15 of the Federal Power Act, or by the deadlines specified in §16.20(c) in the case of licenses not subject to sections 14 and 15 of the Federal Power Act, the Director of the Office of Energy Projects will provide the existing licensee with written notice that no timely applications for the project have been filed.

(b) The existing licensee, within 90 days from the date of the written notice provided in paragraph (a), must file a schedule for the filing of a surrender application for the project for the approval of the Director of the Office of Energy Projects.

(c) Any application for surrender must be filed according to the approved schedule, must comply with the requirements of §16.8 and part 6 of this chapter, and must provide for disposition of any project facility.

PART 20—AUTHORIZATION OF THE ISSUANCE OF SECURITIES BY LICENSEES AND COMPANIES SUBJECT TO SECTIONS 19 AND 20 OF THE FEDERAL POWER ACT

Sec.
20.1 Applicability.
20.2 Regulation of issuance of securities.

AUTHORITY: Secs. 3(16), 19, 20, 41 Stat. 1063, 1073; secs. 201, 309, 49 Stat. 838, 858; 16 U.S.C. 796 (16), 812, 813, 825k.

SOURCE: Order 170, 19 FR 2013, Apr. 8, 1954, unless otherwise noted.

§ 20.1 Applicability.

(a) *Without special proceeding for regulation.* Every security issue within the scope of the jurisdiction conferred upon the Commission by sections 19 and 20 of the Federal Power Act shall be subject to the provisions of §20.2, except a security issue by a person organized and operating in a State under the laws of which its security issues are regulated by a State commission, or by any one described in subsection 201(f) of the act. No other security issue within the scope of sections 19 and 20 shall be subject to §20.2 except as provided in paragraph (b) of this section.

(b) *Reservation of possibility of regulation in other cases.* Not later than 10 days prior to any proposed security issuance which is within the scope of section 19 or section 20 of the act, but excepted by paragraph (a) of this section, any person or state entitled to do so under section 19 or section 20, may file a complaint or request in accordance with the applicable rules of the Commission, or the Commission upon its own motion may by order initiate a proceeding, raising the question whether issuance of such security should be subjected by Commission order to the provisions of §20.2. After notice of such filing or order, and until such request or complaint is denied or dismissed or the proceeding initiated by such order is terminated without subjecting the issuance of the security to the provisions of §20.2, the security in question shall not be issued except it be issued subject to and in compliance with §20.2.

§ 20.2 Regulation of issuance of securities.

The licensee or other person issuing or proposing to issue any security subjected to this section by or pursuant to §20.1, shall be subject to and shall comply with the same requirements as the Commission would administer to it if it were a public utility issuing the security within the meaning and subject to the requirements of section 204 of the Act and part 34 of this subchapter.

CROSS REFERENCE: For applications for authorization of the issuance of securities or the assumption of liabilities, see part 34 of this chapter.

PART 24—DECLARATION OF INTENTION

AUTHORITY: 16 U.S.C. 791a–825r; 44 U.S.C. 3501 *et seq.*; 42 U.S.C. 7101–7352.

§ 24.1 Filing.

An original and eight conformed copies of each declaration of intention under the provisions of section 23(b) of the Act shall be filed. The declaration shall give the name and post office address of the person to whom correspondence in regard to it shall be addressed, and shall be accompanied by:

(a) A brief description of the proposed project and its purposes, including such data as maximum height of the dams, a storage capacity curve of the reservoir or reservoirs showing the maximum, average, and minimum operating pool levels, the initial and ultimate installed capacity of the project, the rated horsepower and head on the turbines, and a curve of turbine discharge versus output at average and minimum operating heads.

(b)(1) A general map (one tracing and three prints) of any convenient size and scale, showing the stream or streams to be utilized and the approximate location and the general plan of the project.

(2) Also a detailed map of the proposed project area showing all Federal lands, and lands owned by States, if any, occupied by the project.

(3) A profile of the river within the vicinity of the project showing the location of the proposed project and any existing improvements in the river.

(4) A duration curve and hydrograph for the natural and proposed regulated flows at the dam site. Furnish references to the published stream flow records used and submit copies of any unpublished records used in preparation of these curves.

(c) (1) A definite statement of the proposed method of utilizing storage or pondage seasonally, weekly and daily, during periods of low and normal flows after the plant is in operation and the system load has grown to the extent that the capacity of the plant is required to meet the load. For example, furnish:

(i) Hydrographs covering a 10–day low water period showing the natural flow of the stream and the effect thereon caused by operations of the proposed power plant:

(ii) Similar hydrographs covering a 10–day period during which the discharge of the stream approximates average recorded yearly flow, and

(iii) Similar hydrographs covering a low water year using average monthly flows.

(2) A system load curve, both daily and monthly, and the position on the load curve that the proposed project would have occupied had it been in operation.

(3) A proposed annual rule of operation for the storage reservoir or reservoirs.

[Order 175, 19 FR 5217, Aug. 18, 1954, as amended by Order 260, 28 FR 315, Jan. 11, 1963; Order 540, 57 FR 21738, May 22, 1992]

PART 25—APPLICATION FOR VACATION OF WITHDRAWAL AND FOR DETERMINATION PERMITTING RESTORATION TO ENTRY

Sec.

§ 25.1 Contents of application.

Any application for vacation of a reservation effected by the filing of an application for preliminary permit or license, or for a determination under the provisions of section 24 of the Act permitting restoration for location, entry, or selection under the public lands laws, or such lands reserved or classified as power sites shall, unless the subject lands are National Forest Lands, be filed with the Bureau of Land Management, Department of the Interior, at the Bureau's office in Washington, DC or at the appropriate regional or field office of the Bureau. If the lands included in such application are National Forest Lands, the application shall be filed with the U.S. Forest Service, Department of Agriculture at the Forest Service's office in Washington, DC, or at the appropriate regional office of the U.S. Forest Service.

Such application shall contain the following data: (a) Full name of applicant; (b) post-office address; (c) description of land by legal subdivisions, including section, township, range, meridian, county, State, and river basin (both main and tributary) in which the land is located; (d) public land act under which entry is intended to be made if land is restored to entry; (e) the use to which it is proposed to put the land, and a statement as to its suitability for the intended use.

(Secs. 24, 309, 41 Stat. 1075, as amended; 49 Stat. 858; 16 USC. 818, 825h)

[Order 175, 19 FR 5218, Aug. 18, 1954, as amended by Order 346, 32 FR 7495, May 20, 1967]

CROSS REFERENCE: For entries subject to section 24 of the Federal Power Act, see also 43 CFR subpart 2320.

§ 25.2 Hearings.

A hearing upon such an application may be ordered by the Commission in its discretion and shall be in accordance with the provisions of subpart E of part 385 of this chapter.

NOTE1: On April 17, 1922, the Commission made the following general determination:

(a) That where lands of the United States have heretofore been, or hereafter may be, reserved or classified as power sites, such reservation or classification being made solely because such lands are either occupied by power transmission lines or their occupancy and use for such purposes has been applied for or authorized under appropriate laws of the United States, and such lands have otherwise no value for power purposes, and are not occupied in trespass, the Commission determines that the value of such lands so reserved or classified, or so applied for or authorized, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws, subject to the reservation of section 24 of the Federal Water Power Act (41 Stat. 1075; 16 U.S.C. 818).

(b) That when notice is given to the Secretary of the Interior of reservations made under the provisions of section 24 of the Federal Water Power Act, such notice shall indicate what lands so reserved, if any, may, in accordance with the determination of the preceding paragraph, be declared open to location, entry, or selection, subject to the reservation of said section 24. Second Annual Report, page 128.

NOTE2: On February 16, 1937, the Commission took the following action:

Consent to Establishment of Grazing Districts, Issuance of Grazing Permits, and Leasing for Grazing Purposes Under the Act of June 28, 1934, as Amended, Government Lands Reserved for Power Purposes

Upon request under date of November 2, 1936, by the acting director, Division of Grazing, Department of the Interior, for consent of the Commission, pursuant to the act of June 28, 1934 (48 Stat. 1269), to the establishment of grazing districts and the issuance of grazing permits on lands of the United States withdrawn, classified, or otherwise reserved for power purposes, except in those instances where grazing will interfere with such purposes; and

Upon request under date of December 7, 1936, by the Acting Secretary of the Interior for consent of the Commission, pursuant to the Act of June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976), to the leasing under section 15 of said Act as amended, of isolated tracts of lands of the United States, withdrawn for power purposes:

The Commission upon consideration of the matter finds and determines: That the establishment of grazing districts, the issuance of grazing permits, and the leasing for grazing purposes, under said Act as amended, of lands of the United States theretofore or thereafter withdrawn, classified or otherwise reserved for power purposes, but not including lands embraced within the project area of any power project theretofore licensed by the Commission or otherwise authorized by the United States, will not injure or destroy the value of such lands for the purposes of power development nor otherwise abridge the jurisdiction of the Commission; Provided, That such grazing districts shall be established and such permits and leases for grazing permits issued subject to the following conditions:

(1) That the establishment of the grazing district or the issuance of the

grazing permit or lease for grazing purposes shall in no wise diminish or affect the jurisdiction of the Commission at any time to issue permits or licenses pursuant to the provisions of the Federal Power Act (49 Stat. 838; 16 U.S.C., Sup., 791–819); and that the issuance by the Commission of a license shall immediately and automatically terminate such grazing district, permit, or lease for grazing purposes as to all lands within the project area described in such license;

(2) That the establishment of the grazing district or the issuance of the grazing permit or lease for grazing purposes involving lands withdrawn for power purposes shall in no wise diminish or affect the jurisdiction of the Commission at any time to make further determinations that the value of any such lands for the purposes of power development will not be injured or destroyed by location entry or selection, as provided by section 24 of the Act and none of such lands shall be declared open, otherwise than as hereinbefore provided, to location, entry or selection except upon such further determination by the Commission; and any such further determination shall immediately and automatically terminate such grazing district, permit, or lease for grazing purposes as to any lands involved in such further determination.

Now, therefore, the Commission consents to the establishment of such grazing districts and the issuance of grazing permits and leases for grazing purposes of lands of the United States reserved for power purposes subject to the conditions hereinabove set out;

Provided, however, That this determination and consent shall be effective for lands embraced within grazing districts, as of the date of the establishment of such districts, and for isolated tracts of lands leased for grazing purposes, it shall be in effect when such leases are issued, provided that notice thereof is received by this Commission from the Bureau of Land Management, Department of the Interior, within 30 days thereafter, such notice to include full legal description of the lands, withdrawn for power purposes which are involved.

(Secs. 24, 308, 39, 41 Stat. 1075, as amended, 40 Stat. 858; 16 U.S.C. 818, 825g, 825h)

[Order 141, 12 FR 8493, Dec. 19, 1947, as amended by Order 225, 47 FR 19056, May 3, 1982]

CROSS REFERENCE: For regulations of the Bureau of Land Management, relating to grazing, see the Index to title 43 CFR part 4000–End.

PART 32—INTERCONNECTION OF FACILITIES

APPLICATION FOR AN ORDER DIRECTING THE ESTABLISHMENT OF PHYSICAL CONNECTION OF FACILITIES

Sec.

AUTHORITY: Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982); E.O. No. 12,009, 3 CFR 1978 Comp., p. 142; Independent Offices Appropriations Act, 31 U.S.C. 9701 (1982); Federal Power Act, 16 U.S.C. 791a–825r (1988); Public Utility Regulatory Policies Act, 16 U.S.C. 2601–2645 (1988).

SOURCE: Order 141, 12 FR 8494, Dec. 19, 1947, unless otherwise noted.

APPLICATION FOR AN ORDER DIRECTING THE ESTABLISHMENT OF PHYSICAL CONNECTION OF FACILITIES

§ 32.1 Contents of application; filing fee.

Every application under section 202(b) of the Act shall be accompanied by the fee prescribed in part 381 of this chapter and shall set forth the following information:

(a) The exact legal name of the applicant and of all persons named as parties in the application.

(b) The name, title, and post office address of the person to whom correspondence in regard to the application shall be addressed.

(c) The person named in the application who is a public utility subject to the act.

(d) The State or States in which each electric utility named in the application operates, together with a brief description of the business of and territory, by counties and States, served by such utility.

(e) Description of the proposed interconnection, showing proposed location, capacity and type of construction.

(f) Reasons why the proposed connection, of facilities will be in the public interest.

(g) What steps, if any, have been taken to secure voluntary interconnection under the provisions of section 202(a) of the Act.

[Order 141, 12 FR 8494, Dec. 19, 1947, as amended by Order 427, 36 FR 5596, Mar. 25, 1971; Order 435, 50 FR 40357, Oct. 3, 1985]

§ 32.2 Required exhibits.

There shall be filed with the application and as a part thereof the following exhibits:

Exhibit A. Statement of the estimated capital cost of all facilities required to establish the connection, and the estimated annual cost of operating such facilities.

Exhibit B. A general or key map on a scale not greater than 20 miles to the inch showing, in separate colors, the territory served by each utility, and the location of the facilities used for the generation and transmission of electric energy, indicating on said map the points between which connection may be established most economically.

§ 32.3 Other information.

The Commission may require additional information when it appears to be pertinent in a particular case.

§ 32.4 Form and style; number of copies.

An original and six conformed copies of an application under §§ 32.1 to 32.4 must be filed.

[Order 342, 32 FR 6622, Apr. 29, 1967, as amended by Order 225, 47 FR 19056, May 3, 1982]

PART 33—APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

Sec.

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; Pub. L. No. 109–58, 119 Stat. 594.

SOURCE: Order 642, 65 FR 71014, Nov. 28, 2000, unless otherwise noted.

§ 33.1 Applicability, definitions, and blanket authorizations.

(a) *Applicability.* (1) The requirements of this part will apply to any public utility seeking authorization under section 203 of the Federal Power Act to:

(i) Sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10 million;

(ii) Merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(iii) Purchase, acquire, or take any security with a value in excess of $10 million of any other public utility; or

(iv) Purchase, lease, or otherwise acquire an existing generation facility:

(A) That has a value in excess of $10 million; and

(B) That is used in whole or in part for wholesale sales in interstate commerce by a public utility.

(2) The requirements of this part shall also apply to any holding company in a holding company system that includes a transmitting utility or an electric utility if such holding company seeks to purchase, acquire, or take any security with a value in excess of $10 million of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric

utility company, with a value in excess of $10 million.

(b) *Definitions.* For the purposes of this part, as used in section 203 of the Federal Power Act (16 U.S.C. 824b)

(1) *Existing generation facility* means a generation facility that is operational at or before the time the section 203 transaction is consummated. ''The time the transaction is consummated'' means the point in time when the transaction actually closes and control of the facility changes hands. ''Operational'' means a generation facility for which construction is complete (*i.e.*, it is capable of producing power). The Commission will rebuttably presume that section 203(a) applies to the transfer of any existing generation facility unless the utility can demonstrate with substantial evidence that the generator is used exclusively for retail sales.

(2) *Non-utility associate company* means any associate company in a holding company system other than a public utility or electric utility company that has wholesale or retail customers served under cost-based regulation.

(3) *Value* when applied to:

(i) Transmission facilities, generation facilities, transmitting utilities, electric utility companies, and holding companies, means the market value of the facilities or companies for transactions between non-affiliated companies; the Commission will rebuttably presume that the market value is the transaction price. For transactions between affiliated companies, value means original cost undepreciated, as defined in the Commission's Uniform System of Accounts prescribed for public utilities and licensees in part 101 of this chapter, or original book cost, as applicable;

(ii) Wholesale contracts, means the market value for transactions between non-affiliated companies; the Commission will rebuttably presume that the market value is the transaction price. For transactions between affiliated companies, value means total expected nominal contract revenues over the remaining life of the contract; and

(iii) Securities, means market value for transactions between non-affiliated companies; the Commission will rebuttably presume that the market value is the agreed-upon transaction price. For transactions between affiliated companies, value means market value if the securities are widely traded, in which case the Commission will rebuttably presume that market value is the market price at which the securities are being traded at the time the transaction occurs; if the securities are not widely traded, market value is determined by:

(A) Determining the value of the company that is the issuer of the equity securities based on the total undepreciated book value of the company's assets;

(B) Determining the fraction of the securities at issue by dividing the number of equity securities involved in the transaction by the total number of outstanding equity securities for the company; and

(C) Multiplying the value determined in paragraph (b)(3)(iii)(A) of this section by the value determined in paragraph (b)(3)(iii)(B) of this section (*i.e.*, the value of the company multiplied by the fraction of the equity securities at issue).

(4) The terms *associate company*, *electric utility company*, *foreign utility company*, *holding company*, and *holding company system* have the meaning given those terms in the Public Utility Holding Company Act of 2005. The term holding company does not include: A State, any political subdivision of a State, or any agency, authority or instrumentality of a State or political subdivision of a State; or an electric power cooperative.

(c) *Blanket Authorizations.* (1) Any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to purchase, acquire, or take any security of:

(i) A transmitting utility or company that owns, operates, or controls only facilities used solely for transmission in intrastate commerce and/or sales of electric energy in intrastate commerce;

(ii) A transmitting utility or company that owns, operates, or controls

only facilities used solely for local distribution and/or sales of electric energy at retail regulated by a state commission; or

(iii) A transmitting utility or company if the transaction involves an internal corporate reorganization that does not present cross-subsidization issues and does not involve a traditional public utility with captive customers.

(2) Any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to purchase, acquire, or take:

(i) Any non-voting security (that does not convey sufficient veto rights over management actions so as to convey control) in a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or an electric utility company; or

(ii) Any voting security in a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or an electric utility company if, after the acquisition, the holding company will own less than 10 percent of the outstanding voting securities; or

(iii) Any security of a subsidiary company within the holding company system.

(3) The blanket authorizations granted under paragraph (c)(2) of this section are subject to the conditions that the holding company shall not:

(i) Borrow from any electric utility company subsidiary in connection with such acquisition; or

(ii) Pledge or encumber the assets of any electric utility company subsidiary in connection with such acquisition;

(4) A holding company granted blanket authorizations in section (c)(2) shall provide the Commission with the same information, on the same basis, that the holding company provides to the Securities and Exchange Commission in connection with any securities purchased, acquired or taken pursuant to this section.

(5) Any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to acquire a foreign utility company. However, if such holding company or any of its affiliates, its subsidiaries, or associate companies within the holding company system have captive customers in the United States, the authorization is conditioned on the holding company verifying by a duly authorized corporate official of the holding company that the proposed transaction:

(i) Will not have any adverse effect on competition, rates, or regulation; and

(ii) Will not result in, at the time of the transaction or in the future:

(A) Any transfer of facilities between a traditional utility associate company with wholesale or retail customers served under cost-based regulation and an associate company;

(B) Any new issuance of securities by traditional utility associate companies with wholesale or retail customers served under cost-based regulation for the benefit of an associate company;

(C) Any new pledge or encumbrance of assets of a traditional utility associate company with wholesale or retail customers served under cost-based regulation for the benefit of an associate company; or

(D) Any new affiliate contracts between non-utility associate companies and traditional utility associate companies with wholesale or retail customers served under cost-based regulation, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.

(iii) A transaction by a holding company subject to the conditions in paragraphs (c)(5)(i) and (ii) of this section will be deemed approved only upon filing the information required in paragraphs (c)(5)(i) and (ii) of this section.

[Order 669, 71 FR 1374, Jan. 6, 2006]

§ 33.2 Contents of application—general information requirements.

Each applicant must include in its application, in the manner and form and in the order indicated, the following general information with respect to the applicant and each entity

whose jurisdictional facilities or securities are involved:

(a) The exact name of the applicant and its principal business address.

(b) The name and address of the person authorized to receive notices and communications regarding the application, including phone and fax numbers, and E-mail addresses.

(c) A description of the applicant, including:

(1) All business activities of the applicant, including authorizations by charter or regulatory approval (to be identified as Exhibit A to the application);

(2) A list of all energy subsidiaries and energy affiliates, percentage ownership interest in such subsidiaries and affiliates, and a description of the primary business in which each energy subsidiary and affiliate is engaged (to be identified as Exhibit B to the application);

(3) Organizational charts depicting the applicant's current and proposed post-transaction corporate structures (including any pending authorized but not implemented changes) indicating all parent companies, energy subsidiaries and energy affiliates unless the applicant demonstrates that the proposed transaction does not affect the corporate structure of any party to the transaction (to be identified as Exhibit C to the application);

(4) A description of all joint ventures, strategic alliances, tolling arrangements or other business arrangements, including transfers of operational control of transmission facilities to Commission approved Regional Transmission Organizations, both current, and planned to occur within a year from the date of filing, to which the applicant or its parent companies, energy subsidiaries, and energy affiliates is a party, unless the applicant demonstrates that the proposed transaction does not affect any of its business interests (to be identified as Exhibit D to the application);

(5) The identity of common officers or directors of parties to the proposed transaction (to be identified as Exhibit E to the application); and

(6) A description and location of wholesale power sales customers and unbundled transmission services customers served by the applicant or its parent companies, subsidiaries, affiliates and associate companies (to be identified as Exhibit F to the application).

(d) A description of jurisdictional facilities owned, operated, or controlled by the applicant or its parent companies, subsidiaries, affiliates, and associate companies (to be identified as Exhibit G to the application).

(e) A narrative description of the proposed transaction for which Commission authorization is requested, including:

(1) The identity of all parties involved in the transaction;

(2) All jurisdictional facilities and securities associated with or affected by the transaction (to be identified as Exhibit H to the application);

(3) The consideration for the transaction; and

(4) The effect of the transaction on such jurisdictional facilities and securities.

(f) All contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the transaction (to be identified as Exhibit I to the application).

(g) A statement explaining the facts relied upon to demonstrate that the proposed transaction is consistent with the public interest. The applicant must include a general explanation of the effect of the transaction on competition, rates and regulation of the applicant by the Commission and state commissions with jurisdiction over any party to the transaction. The applicant should also file any other information it believes relevant to the Commission's consideration of the transaction. The applicant must supplement its application promptly to reflect in its analysis material changes that occur after the date a filing is made with the Commission, but before final Commission action. Such changes must be described and their effect on the analysis explained (to be identified as Exhibit J to the application).

(h) If the proposed transaction involves physical property of any party, the applicant must provide a general or key map showing in different colors

the properties of each party to the transaction (to be identified as Exhibit K to the application).

(i) If the applicant is required to obtain licenses, orders, or other approvals from other regulatory bodies in connection with the proposed transaction, the applicant must identify the regulatory bodies and indicate the status of other regulatory actions, and provide a copy of each order of those regulatory bodies that relates to the proposed transaction (to be identified as Exhibit L to the application). If the regulatory bodies issue orders pertaining to the proposed transaction after the date of filing with the Commission, and before the date of final Commission action, the applicant must supplement its Commission application promptly with a copy of these orders.

(j) An explanation, with appropriate evidentiary support for such explanation (to be identified as Exhibit M to the application):

(1) Of how applicants are providing assurance that the proposed transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company; or

(2) If no such assurance can be provided, an explanation of how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

[Order 642, 65 FR 71014, Nov. 28, 2000, as amended by Order 669, 71 FR 1375, Jan. 6, 2006]

§ 33.3 Additional information requirements for applications involving horizontal competitive impacts.

(a)(1) The applicant must file the horizontal Competitive Analysis Screen described in paragraphs (b) through (f) of this section if, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities (for purposes of this section, merging entities means any party to the proposed transaction or its parent companies, energy subsidiaries or energy affiliates).

(2) A horizontal Competitive Analysis Screen need not be filed if the applicant:

(i) Affirmatively demonstrates that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic markets is *de minimis;* and

(ii) No intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market as the other.

(b) All data, assumptions, techniques and conclusions in the horizontal Competitive Analysis Screen must be accompanied by appropriate documentation and support.

(1) If the applicant is unable to provide any specific data required in this section, it must identify and explain how the data requirement was satisfied and the suitability of the substitute data.

(2) The applicant may provide other analyses for defining relevant markets (*e.g.* the Hypothetical Monopolist Test with or without the assumption of price discrimination) in addition to the delivered price test under the horizontal Competitive Analysis Screen.

(3) The applicant may use a computer model to complete one or more steps in the horizontal Competitive Analysis Screen. The applicant must fully explain, justify and document any model used and provide descriptions of model formulation, mathematical specifications, solution algorithms, as well as the annotated model code in executable form, and specify the software needed to execute the model. The applicant must explain and document how inputs were developed, the assumptions underlying such inputs and any adjustments made to published data that are used as inputs. The applicant must also explain how it tested the predictive value of the model, for example, using historical data.

(c) The horizontal Competitive Analysis Screen must be completed using the following steps:

(1) *Define relevant products.* Identify and define all wholesale electricity products sold by the merging entities during the two years prior to the date of the application, including, but not limited to, non-firm energy, short-term

capacity (or firm energy), long-term capacity (a contractual commitment of more than one year), and ancillary services (specifically spinning reserves, non-spinning reserves, and imbalance energy, identified and defined separately). Because demand and supply conditions for a product can vary substantially over the year, periods corresponding to those distinct conditions must be identified by load level, and analyzed as separate products.

(2) *Identify destination markets.* Identify each wholesale power sales customer or set of customers (destination market) affected by the proposed transaction. Affected customers are, at a minimum, those entities directly interconnected to any of the merging entities and entities that have purchased electricity at wholesale from any of the merging entities during the two years prior to the date of the application. If the applicant does not identify an entity to whom the merging entities have sold electricity during the last two years as an affected customer, the applicant must provide a full explanation for each exclusion.

(3) *Identify potential suppliers.* The applicant must identify potential suppliers to each destination market using the delivered price test described in paragraph (c)(4) of this section. A seller may be included in a geographic market to the extent that it can economically and physically deliver generation services to the destination market.

(4) *Perform delivered price test.* For each destination market, the applicant must calculate the amount of relevant product a potential supplier could deliver to the destination market from owned or controlled capacity at a price, including applicable transmission prices, loss factors and ancillary services costs, that is no more than five (5) percent above the pre-transaction market clearing price in the destination market.

(i) *Supplier's presence.* The applicant must measure each potential supplier's presence in the destination market in terms of generating capacity, using economic capacity and available economic capacity measures. Additional adjustments to supplier presence may be presented; applicants must support any such adjustment.

(A) *Economic capacity* means the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be economically delivered to the destination market. Prior to applying the delivered price test, the generating capacity meeting this definition must be adjusted by subtracting capacity committed under long-term firm sales contracts and adding capacity acquired under long-term firm purchase contracts (*i.e.*, contracts with a remaining commitment of more than one year). The capacity associated with any such adjustments must be attributed to the party that has authority to decide when generating resources are available for operation. Other generating capacity may also be attributed to another supplier based on operational control criteria as deemed necessary, but the applicant must explain the reasons for doing so.

(B) *Available economic capacity* means the amount of generating capacity meeting the definition of economic capacity less the amount of generating capacity needed to serve the potential supplier's native load commitments, as described in paragraph (d)(4)(i) of this section.

(C) *Available transmission capacity.* Each potential supplier's economic capacity and available economic capacity (and any other measure used to determine the amount of relevant product that could be delivered to a destination market) must be adjusted to reflect available transmission capability to deliver each relevant product. The allocation to a potential supplier of limited capability of constrained transmission paths internal to the merging entities' systems or interconnecting the systems with other control areas must recognize both the transmission capability not subject to firm reservations by others and any firm transmission rights held by the potential supplier that are not committed to long-term transactions. For each such instance where limited transmission capability must be allocated among potential suppliers, the applicant must explain the method used and show the results of such allocation.

(D) *Internal interface.* If the proposed transaction would cause an interface that interconnects the transmission systems of the merging entities to become transmission facilities for which the merging entities would have a ''native load'' priority under their open access transmission tariff (*i.e.,* where the merging entities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonable forecasted within the utility's current planning horizon), all of the unreserved capability of the interface must be allocated to the merging entities for purposes of the horizontal Competitive Analysis Screen, unless the applicant demonstrates one of the following:

(*1*) The merging entities would not have adequate economic capacity to fully use such unreserved transmission capability;

(*2*) The merging entities have committed a portion of the interface capability to third parties; or

(*3*) Suppliers other than the merging entities have purchased a portion of the interface capability.

(ii) [Reserved]

(5) *Calculate market concentration.* The applicant must calculate the market share, both pre- and post-merger, for each potential supplier, the Herfindahl-Hirschman Index (HHI) statistic for the market, and the change in the HHI statistic. (The HHI statistic is a measure of market concentration and is a function of the number of firms in a market and their respective market shares. The HHI statistic is calculated by summing the squares of the individual market shares, expressed as percentages, of all potential suppliers to the destination market.) To make these calculations, the applicant must use the amounts of generating capacity (*i.e.,* economic capacity and available economic capacity, and any other relevant measure) determined in paragraph (c)(4)(i) of this section, for each product in each destination market.

(6) *Provide historical transaction data.* The applicant must provide historical trade data and historical transmission data to corroborate the results of the horizontal Competitive Analysis Screen. The data must cover the two-year period preceding the filing of the application. The applicant may adjust the results of the horizontal Competitive Analysis Screen, if supported by historical trade data or historical transmission service data. Any adjusted results must be shown separately, along with an explanation of all adjustments to the results of the horizontal Competitive Analysis Screen. The applicant must also provide an explanation of any significant differences between results obtained by the horizontal Competitive Analysis Screen and trade patterns in the last two years.

(d) In support of the delivered price test required by paragraph (c)(4) of this section, the applicant must provide the following data and information used in calculating the economic capacity and available economic capacity that a potential supplier could deliver to a destination market. The transmission data required by paragraphs (d)(7) through (d)(9) of this section must be supplied for the merging entities' systems. The transmission data must also be supplied for other relevant systems, to the extent data are publicly available.

(1) *Generation capacity.* For each generating plant or unit owned or controlled by each potential supplier, the applicant must provide:

(i) Supplier name;

(ii) Name of the plant or unit;

(iii) Primary and secondary fuel-types;

(iv) Nameplate capacity;

(v) Summer and winter total capacity; and

(vi) Summer and winter capacity adjusted to reflect planned and forced outages and other factors, such as fuel supply and environmental restrictions.

(2) *Variable cost.* For each generating plant or unit owned or controlled by each potential supplier, the applicant must also provide variable cost components.

(i) These cost components must include at a minimum:

(A) Variable operation and maintenance, including both fuel and non-fuel operation and maintenance; and

(B) Environmental compliance.

(ii) To the extent costs described in paragraph (d)(2)(i) of this section are allocated among units at the same

plant, allocation methods must be fully described.

(3) *Long-term purchase and sales data.* For each sale and purchase of capacity, the applicant must provide the following information:

(i) Purchasing entity name;

(ii) Selling entity name;

(iii) Duration of the contract;

(iv) Remaining contract term and any evergreen provisions;

(v) Provisions regarding renewal of the contract;

(vi) Priority or degree of interruptibility;

(vii) FERC rate schedule number, if applicable;

(viii) Quantity and price of capacity and/or energy purchased or sold under the contract; and

(ix) Information on provisions of contracts which confer operational control over generation resources to the purchaser.

(4) *Native load commitments.* (i) Native load commitments are commitments to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate its system to meet their reliable electricity needs.

(ii) The applicant must provide supplier name and hourly native load commitments for the most recent two years. In addition, the applicant must provide this information for each load level, if load-differentiated relevant products are analyzed.

(iii) If data on native load commitments are not available, the applicant must fully explain and justify any estimates of these commitments.

(5) *Transmission and ancillary service prices, and loss factors.* (i) The applicant must use in the horizontal Competitive Analysis Screen the maximum rates stated in the transmission providers' tariffs. If necessary, those rates should be converted to a dollars-per-megawatt hour basis and the conversion method explained.

(ii) If a regional transmission pricing regime is in effect that departs from system-specific transmission rates, the horizontal Competitive Analysis Screen must reflect the regional pricing regime.

(iii) The following data must be provided for each transmission system that would be used to deliver energy from each potential supplier to a destination market:

(A) Supplier name;

(B) Name of transmission system;

(C) Firm point-to-point rate;

(D) Non-firm point-to-point rate;

(E) Scheduling, system control and dispatch rate;

(F) Reactive power/voltage control rate;

(G) Transmission loss factor; and

(H) Estimated cost of supplying energy losses.

(iv) The applicant may present additional alternative analysis using discount prices if the applicant can support it with evidence that discounting is and will be available.

(6) *Destination market price.* The applicant must provide, for each relevant product and destination market, market prices for the most recent two years. The applicant may provide suitable proxies for market prices if actual market prices are unavailable. Estimated prices or price ranges must be supported and the data and approach used to estimate the prices must be included with the application. If the applicant relies on price ranges in the analysis, such ranges must be reconciled with any actual market prices that are supplied in the application. Applicants must demonstrate that the results of the analysis do not vary significantly in response to small variations in actual and/or estimated prices.

(7) *Transmission capability.* (i) The applicant must provide simultaneous transfer capability data, if available, for each of the transmission paths, interfaces, or other facilities used by suppliers to deliver to the destination markets on an hourly basis for the most recent two years.

(ii) Transmission capability data must include the following information:

(A) Transmission path, interface, or facility name;

(B) Total transfer capability (TTC); and

(C) Firm available transmission capability (ATC).

(iii) Any estimated transmission capability must be supported and the data and approach used to make the estimates must be included with the application.

(8) *Transmission constraints.* (i) For each existing transmission facility that affects supplies to the destination markets and that has been constrained during the most recent two years or is expected to be constrained within the planning horizon, the applicant must provide the following information:

(A) Name of all paths, interfaces, or facilities affected by the constraint;

(B) Locations of the constraint and all paths, interfaces, or facilities affected by the constraint;

(C) Hours of the year when the transmission constraint is binding; and

(D) The system conditions under which the constraint is binding.

(ii) The applicant must include information regarding expected changes in loadings on transmission facilities due to the proposed transaction and the consequent effect on transfer capability.

(iii) To the extent possible, the applicant must provide system maps showing the location of transmission facilities where binding constraints have been known or are expected to occur.

(9) *Firm transmission rights (Physical and Financial).* For each potential supplier to a destination market that holds firm transmission rights necessary to directly or indirectly deliver energy to that market, or that holds transmission congestion contracts, the applicant must provide the following information:

(i) Supplier name;

(ii) Name of transmission path interface, or facility;

(iii) The FERC rate schedule number, if applicable, under which transmission service is provided; and

(iv) A description of the firm transmission rights held (including, at a minimum, quantity and remaining time the rights will be held, and any relevant time restrictions on transmission use, such as peak or off-peak rights).

(10) *Summary table of potential suppliers' presence.* (i) The applicant must provide a summary table with the following information for each potential supplier for each destination market:

(A) Potential supplier name;

(B) The potential supplier's total amount of economic capacity (not subject to transmission constraints); and

(C) The potential supplier's amount of economic capacity from which energy can be delivered to the destination market (after adjusting for transmission availability).

(ii) A similar table must be provided for available economic capacity, and for any other generating capacity measure used by the applicant.

(11) *Historical trade data.* (i) The applicant must provide data identifying all of the merging entities' wholesale sales and purchases of electric energy for the most recent two years.

(ii) The applicant must include the following information for each transition:

(A) Type of transaction (such as nonfirm, short-term firm, long-term firm, peak, off-peak, etc.);

(B) Name of purchaser;

(C) Name of seller;

(D) Date, duration and time period of the transaction;

(E) Quantity of energy purchased or sold;

(F) Energy charge per unit;

(G) Megawatt hours purchased or sold;

(H) Price; and

(I) The delivery points used to effect the sale or purchase.

(12) *Historical transmission data.* The applicant must provide information concerning any transmission service denials, interruptions and curtailments on the merging entities' systems, for the most recent two years, to the extent the information is available from OASIS data, including the following information:

(i) Name of the customer denied, interrupted or curtailed;

(ii) Type, quantity and duration of service at issue;

(iii) The date and period of time involved;

(iv) Reason given for the denial, interruption or curtailment;

(v) The transmission path; and

(vi) The reservations or other use anticipated on the affected transmission

path at the time of the service denial, curtailment or interruption.

(e) *Mitigation.* Any mitigation measures proposed by the applicant (including, for example, divestiture or participation in a regional transmission organization) which are intended to mitigate the adverse effect of the proposed transaction must, to the extent possible, be factored into the horizontal Competitive Analysis Screen as an additional post-transaction analysis. Any mitigation commitments that involve facilities (*e.g.*, in connection with divestiture of generation) must identify the facilities affected by the commitment, along with a timetable for implementing the commitments.

(f) *Additional factors.* If the applicant does not propose mitigation, the applicant must address:

(1) The potential adverse competitive effects of the transaction.

(2) The potential for entry in the market and the role that entry could play in mitigating adverse competitive effects of the transaction;

(3) The efficiency gains that reasonably could not be achieved by other means; and

(4) Whether, but for the transaction, one or more of the merging entities would be likely to fail, causing its assets to exit the market.

[65 FR 71014, Nov. 28, 2000; 65 FR 76005, Dec. 5, 2000]

§ 33.4 Additional information requirements for applications involving vertical competitive impacts.

(a)(1) The applicant must file the vertical Competitive Analysis described in paragraphs (b) through (e) of this section if, as a result of the proposed transaction, a single corporate entity has ownership or control over one or more merging entities that provides inputs to electricity products and one or more merging entities that provides electric generation products (for purposes of this section, merging entities means any party to the proposed transaction or its parent companies, energy subsidiaries or energy affiliates).

(2) A vertical Competitive Analysis need not be filed if the applicant can affirmatively demonstrate that:

(i) The merging entities currently do not provide inputs to electricity products (*i.e.*, upstream relevant products) and electricity products (*i.e.*, downstream relevant products) in the same geographic markets or that the extent of the business transactions in the same geographic market is *de minimis*; and no intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market as the other.

(ii) The extent of the upstream relevant products currently provided by the merging entities is used to produce a *de minimis* amount of the relevant downstream products in the relevant destination markets, as defined in paragraph (c)(2) of § 33.3.

(b) All data, assumptions, techniques and conclusions in the vertical Competitive Analysis must be accompanied by appropriate documentation and support.

(c) The vertical Competitive Analysis must be completed using the following steps:

(1) *Define relevant products*—(i) *Downstream relevant products.* The applicant must identify and define as downstream relevant products all products sold by merging entities in relevant downstream geographic markets, as outlined in paragraph (c)(1) of § 33.3.

(ii) *Upstream relevant products.* The applicant must identify and define as upstream relevant products all inputs to electricity products provided by upstream merging entities in the most recent two years.

(2) *Define geographic markets*—(i) *Downstream geographic markets.* The applicant must identify all geographic markets in which it or any merging entities sell the downstream relevant products, as outlined in paragraphs (c)(2) and (c)(3) of § 33.3.

(ii) *Upstream geographic markets* The applicant must identify all geographic markets in which it or any merging entities provide the upstream relevant products.

(3) *Analyze competitive conditions*—(i) *Downstream geographic market.* (A) The applicant must compute market share for each supplier in each relevant downstream geographic market and the HHI statistic for the downstream market. The applicant must provide a

summary table with the following information for each relevant downstream geographic market:

(*1*) The economic capacity of each downstream supplier (specify the amount of such capacity served by each upstream supplier);

(*2*) The total amount of economic capacity in the downstream market served by each upstream supplier;

(*3*) The market share of economic capacity served by each upstream supplier; and

(*4*) The HHI statistic for the downstream market.

(B) A similar table must be provided for available economic capacity and for any other measure used by the applicant.

(ii) *Upstream geographic market*. The applicant must provide a summary table with the following information for each upstream relevant product in each relevant upstream geographic market:

(A) The amount of relevant product provided by each upstream supplier;

(B) The total amount of relevant product in the market;

(C) The market share of each upstream supplier; and

(D) The HHI statistic for the upstream market.

(d) *Mitigation*. Any mitigation measures proposed by the applicant (including, for example, divestiture or participation in an Regional Transmission Organization) which are intended to mitigate the adverse effect of the proposed transaction must, to the extent possible, be factored into the vertical competitive analysis as an additional post-transaction analysis. Any mitigation measures that involve facilities must identify the facilities affected by the commitment.

(e) *Additional factors*. (1) If the applicant does not propose mitigation measures, the applicant must address:

(i) The potential adverse competitive effects of the transaction.

(ii) The potential for entry in the market and the role that entry could play in mitigating adverse competitive effects of the transaction;

(iii) The efficiency gains that reasonably could not be achieved by other means; and

(iv) Whether, but for the proposed transaction, one or more of the parties to the transaction would be likely to fail, causing its assets to exit the market.

(2) The applicant must address each of the additional factors in the context of whether the proposed transaction is likely to present concerns about raising rivals' costs or anticompetitive coordination.

§ 33.5 Proposed accounting entries.

If the applicant is required to maintain its books of account in accordance with the Commission's Uniform System of Accounts in part 101 of this chapter, the applicant must present proposed accounting entries showing the effect of the transaction with sufficient detail to indicate the effects on all account balances (including amounts transferred on an interim basis), the effect on the income statement, and the effects on other relevant financial statements. The applicant must also explain how the amount of each entry was determined.

§ 33.6 Form of Notice.

The applicant must include a form of notice of the application suitable for publication in the FEDERAL REGISTER in accordance with the specifications in §385.203(d) of this chapter. The form of notice shall be on electronic media as specified by the Secretary.

[Order 647, 69 FR 32438, June 10, 2004]

§ 33.7 Verification.

The original application must be signed by a person or persons having authority with respect thereto and having knowledge of the matters therein set forth, and must be verified under oath.

§ 33.8 Number of copies.

An original and eight copies of the application under this part must be submitted. If the applicant submits a public and a non-public version (containing information filed under a request for privileged treatment), the original and at least three of the eight copies must be of the non-public version of the filing, pursuant to §388.112(b)(ii). If the applicant must

submit information specified in paragraphs (b), (c), (d), (e) and (f) of §33.3 or paragraphs (b), (c), (d) and (e) of §33.4, the applicant must submit all such information in electronic format (*e.g.*, on computer diskette or on CD) along with a printed description and summary. The electronic version must be submitted in accordance with §385.2011 of the Commission's regulations. The printed portion of the applicant's submission must include documentation for the electronic submission, including all file names and a summary of the data contained in each file. Each column (or data item) in each separate data table or chart must be clearly labeled in accordance with the requirements of §33.3 and §33.4. Any units of measurement associated with numeric entries must also be included.

§33.9 Protective order.

If the applicant seeks to protect any portion of the application, or any attachment thereto, from public disclosure pursuant to §388.112 of this chapter, the applicant must include with its request for privileged treatment a proposed protective order under which the parties to the proceeding will be able to review any of the data, information, analysis or other documentation relied upon by the applicant for which privileged treatment is sought.

§33.10 Additional information.

The Director of the Office of Markets, Tariffs and Rates, or his designee, may, by letter, require the applicant to submit additional information as is needed for analysis of an application filed under this part.

§33.11 Commission procedures for the consideration of applications under section 203 of the FPA.

(a) The Commission will act on a completed application for approval of a transaction (*i.e.*, one that is consistent with the requirements of this part) not later than 180 days after the completed application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of section 203(a)(4) of the FPA and issues, by the 180th day, an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

(b) The Commission will provide for the expeditious consideration of completed applications for the approval of transactions that are not contested, do not involve mergers, and are consistent with Commission precedent. The transactions that would generally warrant expedited review include:

(1) A disposition of only transmission facilities, particularly those that both before and after the transaction remain under the functional control of a Commission-approved regional transmission organization or independent system operator; and

(2) Transactions that do not require an Appendix A analysis.[1]

[Order 669, 71 FR 1375, Jan. 6, 2006]

PART 34—APPLICATION FOR AUTHORIZATION OF THE ISSUANCE OF SECURITIES OR THE ASSUMPTION OF LIABILITIES

Sec.

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: Order 182, 46 FR 50514, Oct. 14, 1981, unless otherwise noted.

CROSS REFERENCES: For rules of practice and procedure, see part 385 of this chapter.

[1] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 FR 68,595 (Dec. 30, 1996), FERC Stats. & Regs. ¶31,044 (1996), *reconsideration denied*, Order No. 592–A, 62 FR 33,340 (June 19, 1997), 79 FERC ¶61,321 (1997) (Merger Policy Statement).

For Approved Forms, Federal Power Act, see part 131 of this chapter.

OMB REFERENCE: ''FERC Filing No. 523'' is the identification number used by the Commission and the Office of Management and Budget to reference the filing requirements in part 34.

§ 34.1 Applicability; definitions; exemptions in case of certain State regulation, certain short-term issuances and certain qualifying facilities.

(a) *Applicability.* This part applies to applications for authorization from the Commission to issue securities or assume an obligation or liability which are filed by:

(1) Licensees and other entities pursuant to sections 19 and 20 of the Federal Power Act (41 Stat. 1073, 16 U.S.C. 812, 813) and part 20 of the Commission's regulations; and

(2) Public utilities pursuant to section 204 of the Federal Power Act (49 Stat. 850, 16 U.S.C. 824c).

(b) *Definitions.* For the purpose of this part:

(1) The term *utility* means a licensee, public utility or other entity seeking authorization under sections 19, 20 or 204 of the Federal Power Act;

(2) The term *securities* includes any note, stock, treasury stock, bond, or debenture or other evidence of interest in or indebtedness of a utility;

(3) The term *issuance or placement of securities* means issuance or placement of securities, or assumption of obligation or liability; and

(4) The term *State* means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(c) *Exemptions.* (1) If an agency of the State in which the utility is organized and operating approves or authorizes, in writing, the issuance of securities prior to their issuance, the utility is exempt from the provisions of sections 19, 20 and 204 of the Federal Power Act and the regulations under this part, with respect to such securities.

(2) This part does not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing one year or less after the date of such issue, renewal, or assumption of liability, if the aggregate of such note or draft and all other then-outstanding notes and drafts of a maturity of one year or less on which the utility is primarily or secondarily liable, is not more than 5 percent of the par value of the other then-outstanding securities of the utility as of the date of issue or renewal of, or assumption of liability on, the note or draft. In the case of securities having no par value, the par value for the purpose of this part is the fair market value, as of the date of issue or renewal of, or assumption of liability on, the note or draft.

(3) *For certain qualifying facilities.* Any cogeneration or small power production facility which is exempt from sections 19, 20 and 204 of the Federal Power Act pursuant to § 292.601 of this chapter shall be exempt from the provisions of this part.

[Order 182, 46 FR 50514, Oct. 14, 1981, as amended at 48 FR 9851, Mar. 9, 1983; Order 575, 60 FR 4852, Jan. 25, 1995]

§ 34.2 Placement of securities.

(a) *Method of issuance.* Upon obtaining authorization from the Commission, utilities may issue securities by either a competitive bid or negotiated placement, provided that:

(1) Competitive bids are obtained from at least two prospective dealers, purchasers or underwriters; or

(2) Negotiated offers are obtained from at least three prospective dealers, purchasers or underwriters; and

(3) The utility:

(i) Accepts the bid or offer that provides the utility with the lowest cost of money for securities with fixed or variable interest or dividend rates, or

(ii) Accepts the bid or offer that provides the utility with the greatest net proceeds for securities with no specified interest or dividend rates, or

(iii) The utility has filed for and obtained authorization from the Commission to accept bids or offers other than those specified in paragraphs (a)(3)(i) or (a)(3)(ii) of this section.

(b) *Exemptions.* The provisions of paragraph (a) of this section do not apply where:

(1) The securities are to be issued to existing holders of securities on a pro rata basis;

(2) The utility receives an unsolicited offer to purchase the securities;

(3) The securities have a maturity of one year or less; or

(4) The securities are to be issued in support of or to guarantee securities issued by governmental or quasi-governmental bodies for the benefit of the utility.

(c) *Prohibitions.* No securities will be placed with any person who:

(1) Has performed any service or accepted any fee or compensation with respect to the proposed issuance of securities prior to submission of bids or entry into negotiations for placement of such securities; or

(2) Would be in violation of section 305(a) of the Federal Power Act with respect to the issuance.

[Order 575, 60 FR 4853, Jan. 25, 1995]

§ 34.3 Contents of application for issuance of securities.

Each application to the Commission for authority to issue securities shall contain the information specified in this section. In lieu of filing the information required in paragraphs (e), (i) and (j) of this section, a specific reference may be made to the portion of the registration statement filed under § 34.4(f), which includes the information required in these paragraphs.

(a) The official name of the applicant and address of its principal business office.

(b) The State in which the utility is incorporated, the date of incorporation, and each State in which it operates.

(c) The name, address and telephone number of a person within the utility authorized to receive notices and communications with respect to the application.

(d) The date by which Commission action is requested.

(e) A full description of the securities proposed to be issued, including:

(1) Type and nature of securities;

(2) Amount of securities (par or stated value and number of units);

(3) Interest or dividend rate, if any;

(4) Dates of issuance and maturity;

(5) Institutional rating of the securities—or if the securities are not rated, an explanation as to why they are not rated, and if the securities will be rated, an estimate of the rating; and

(6) Any stock exchange on which the securities will be listed.

(f) The purpose for which the securities for which application is made are to be issued:

(1) If the purpose of such issuance is the construction, completion, extension, or improvement of facilities, describe in reasonable detail the construction program for which the funds were or are to be used.

(2) If the purpose for such issuance is for the refunding of obligations, describe in detail the obligations to be refunded, including the character, principal amounts, applicable discount or premium, dates of issuance and maturity, and all other material facts concerning such obligations.

(3) If the purpose for such issuance is for other than construction or refunding, explain such other purpose(s) in detail.

(g) A statement as to whether or not any application with respect to the transaction or any part thereof is required to be filed with any State regulatory body.

(h) A detailed statement of the facts relied upon by the applicant to show that the issuance:

(1) Is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, is necessary or appropriate for or consistent with the proper performances by the applicant of service as a public utility and will not impair its ability to perform that service, and

(2) Is reasonably necessary or appropriate for such purposes.

(i) A detailed statement of the bond indenture(s) or other limitations on interest and dividend coverage, and the effects of such limitations on the issuance of additional debt or equity securities.

(j) A brief summary of any rate changes which were made effective during the period for which financial statements are submitted or which became or will become effective after the period for which statements are submitted.

(k) The applicant must include a form of notice of the application suitable for publication in the FEDERAL REGISTER in accordance with the specifications in § 385.203(d) of this chapter.

The form of notice shall be on electronic media as specified by the Secretary.

[Order 182, 46 FR 50514, Oct. 14, 1981, as amended by Order 390, 49 FR 32505, Aug. 14, 1984; Order 575, 60 FR 4853, Jan. 25, 1995; Order 593, 62 FR 1283, Jan. 9, 1997; Order 647, 69 FR 32438, June 10, 2004]

§ 34.4 Required exhibits.

(a) *Exhibit A.* The applicant must file the statement of corporate purposes from its articles of incorporation.

(b) *Exhibit B.* A copy of all resolutions of the applicant's directors authorizing the issuance of securities for which the application is made; and copies of the resolution of the stockholders approving such issuance if approval of the stockholders has been obtained.

(c) *Exhibit C.* The Balance Sheet and attached notes for the most recent 12-month period for which financial statements have been published, provided that the 12-month period ended no more than 4 months prior to the date of the filing of the application, on both an actual basis and a pro forma basis in the form prescribed for the ''Comparative Balance Sheet'' of FERC Form No. 1, ''Annual Report for major electric utilities, licensees and others.'' Each adjustment made in determining the pro forma basis must be clearly identified.

(d) *Exhibit D.* The Income Statement and attached notes for the most recent 12-month period for which financial statements have been published, provided that the 12-month period ended no more than 4 months prior to the date of the filing of the application, on both an actual basis and a pro forma basis in the form prescribed for the ''Statement of Income for the Year'' of FERC Form No. 1, ''Annual Report for major electric utilities, licensees and others.'' Each adjustment made in determining the pro forma basis must be clearly identified.

(e) *Exhibit E.* A Statement of Cash Flows and Computation of Interest Coverage on an actual basis and a pro forma basis for the most recent 12-month period for which financial statements have been published, provided that the 12-month period ended no more than 4 months prior to the date of the filing of the application. The Statement of Cash Flows must be in the form prescribed for the ''Statement of Cash Flows'' of the FERC Form No. 1, Annual Report for major electric utilities, licensees and others,'' followed by a computation of interest coverage, in the form of the following worksheet:

Federal Energy Regulatory Commission worksheet for computation of interest coverage	Actual for the year ended mm-dd-yy	OMB control No. 1902–0043, pro forma for the year ended mm-dd-yy
Net income		
Add: Interest on Long-Term Debt, Interest on Short-Term Debt, Other Interest Expense, Total Interest Expense		
Federal and State Income Taxes		
Income Before Interest and Income Taxes		
Computation of Interest Coverage		
Income Before Interest and Income Taxes ÷ Total Interest Expense = Interest Coverage		

(f) *Exhibit F.* A copy of registration statement and exhibits which are filed with the Securities and Exchange Commission for the proposed security issuance.

[Order 182, 46 FR 50514, Oct. 14, 1981, as amended by Order 390, 49 FR 32505, Aug. 14, 1984; Order 575, 60 FR 4853, Jan. 25, 1995; 60 FR 27882, May 26, 1995]

§ 34.5 Additional information.

The Commission may, in its discretion, require the filing of additional information which appears necessary to reach a determination on any particular application.

§ 34.6 Form and style.

Each application pursuant to this part 34 shall conform to the requirements of subpart T of part 385 of this chapter.

[Order 182, 46 FR 50514, Oct. 14, 1981, as amended by Order 225, 47 FR 19056, May 3, 1982]

§ 34.7 Number of copies to be filed.

Each applicant shall submit to this Commission an original and four copies

of each application pursuant to this part 34.

EFFECTIVE DATE NOTE: At 70 FR 35375, June 20, 2005, §34.7 was revised, effective at the time of the next e-filing release during the Commission's next fiscal year. For the convenience of the user, the revised text follows:

§34.7 Filing requirements.

Each applicant shall submit to this Commission an electronic version of each application pursuant to this part 34. The electronic version shall be considered a ''qualified document'' in accordance with §385.2003(c)(1) and (2) of this chapter. As a qualified document, no paper copy version of the filing is required unless there is a request for privileged or protected treatment or the document is combined with another document as provided in §385.2003(c)(3) or (4). Submit each application in electronic format in accordance with §385.2003.

§34.8 Verification.

The original application shall be signed by an authorized representative of the applicant, who has knowledge of the matters set forth therein, and it shall be verified under oath.

EFFECTIVE DATE NOTE: At 70 FR 35375, June 20, 2005, §34.8 was revised, effective at the time of the next e-filing release during the Commission's next fiscal year. For the convenience of the user, the revised text follows:

§34.8 Verification.

An application verification shall be signed under oath by an authorized representative of the applicant, who has knowledge of the matters set forth therein and as provided in §385.2005 of this chapter, and retained at the applicant's business location until the relevant proceeding has been concluded.

§34.9 Filing fee.

Each application shall be accompanied by a fee as prescribed in part 381 of this chapter.

[Order 182, 46 FR 50514, Oct. 14, 1981, by Order 435, amended at 50 FR 40357, Oct. 3, 1985]

EFFECTIVE DATE NOTE: At 70 FR 35375, June 20, 2005, §34.9 was revised, effective at the time of the next e-filing release during the Commission's next fiscal year. For the convenience of the user, the revised text follows:

§34.9 Filing fee.

Each application shall be accompanied by the submission of a filing fee if one is prescribed in part 381 of this chapter.

§34.10 Reports.

The applicant must file reports under §131.43 and §131.50 of this chapter no later than 30 days after the sale or placement of long-term debt or equity securities or the entry into guarantees or assumptions of liabilities pursuant to authority granted under this part.

[Order 575, 60 FR 4853, Jan. 25, 1995]

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

Subpart A—Application

Sec.

Subpart B—Documents To Be Submitted With a Filing

Subpart C—Other Filing Requirements

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: Order 271, 28 FR 10573, Oct. 2, 1963, unless otherwise noted.

Subpart A—Application

§ 35.0 Filing fees.

Every filing made under this part shall be accompanied by the fee described in part 381 of this chapter.

[Order 427, 36 FR 5597, Mar. 25, 1971, as amended by Order 435, 50 FR 40357, Oct. 3, 1985]

§ 35.1 Application; obligation to file rate schedules and tariffs.

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules, as defined in §35.2(b), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates and charges and all contracts which in any manner affect or relate to such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in §131.52 of this chapter: *Provided, however,* In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

(b) A rate schedule applicable to a transmission or sale of electric energy, other than that which proposes to supersede, supplement, cancel or otherwise change the provisions of a rate schedule required to be on file with this Commission, shall be filed as an initial rate in accordance with §35.12.

(c) A rate schedule applicable to a transmission or sale of electric energy which proposes to supersede, supplement, cancel or otherwise change any of the provisions of a rate schedule required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with §35.13, except Notices of Cancellation or Termination which shall be filed as a change in accordance with §35.15.

(d)(1) The provisions of this paragraph (d) shall apply to rate schedules tendered for filing on or after August 1, 1976, which are applicable to the transmission or sale of firm power for resale to an all-requirements customer, whether tendered pursuant to §35.12 as an initial rate schedule or tendered

pursuant to § 35.13 as a change in an existing rate schedule whose term has expired or whose term is to be extended.

(2) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to give the party furnishing service the unrestricted right to file unilateral rate changes under section 205 of the Federal Power Act:

> Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

(3) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to withhold from the party furnishing service the right to file any unilateral rate changes under section 205 of the Federal Power Act:

> The rates for service specified herein shall remain in effect for the term of _____ or until _____, and shall not be subject to change through application to the Federal Energy Regulatory Commission pursuant to the provisions of Section 205 of the Federal Power Act absent the agreement of all parties thereto.

(4) Rate schedules covered by the terms of paragraph (d)(1) of this section, but which are not covered by paragraphs (d)(2) or (d)(3) of this section, are not required to contain either of the boilerplate provisions set forth in paragraph (d)(2) or (d)(3) of this section.

(e) No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

(f) A rate schedule applicable to the sale of electric power by a public utility to the Bonneville Power Administration under section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Pub. L. No. 96–501 (1980)) shall be filed in accordance with subpart D of this part.

(g) For the purposes of paragraph (a) of this section, any agreement that conforms to the form of service agreement that is part of the public utility's approved tariff pursuant to § 35.10a of this chapter and any market-based rate agreement pursuant to a tariff shall not be filed with the Commission. All agreements must, however, be retained and be made available for public inspection and copying at the public utility's business office during regular business hours and provided to the Commission or members of the public upon request. Any individually executed service agreement for transmission, cost-based power sales, or other generally applicable services that deviates in any material respect from the applicable form of service agreement contained in the public utility's tariff and all unexecuted agreements under which service will commence at the request of the customer, are subject to the filing requirements of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 541, 40 FR 56425, Dec. 3, 1975; Order 541–A, 41 FR 27831, July 7, 1976; 46 FR 50520, Oct. 14, 1981; Order 337, 48 FR 46976, Oct. 17, 1983; Order 541, 57 FR 21734, May 22, 1992; Order 2001, 67 FR 31069, May 8, 2002]

§ 35.2 Definitions.

(a) *Electric service.* The term *electric service* as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. *Electric service* shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, *electric service* is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange,

wheeling charge, facilities charge, rental or otherwise.

(b) *Rate schedule.* The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contractual document, purchase or sale agreement, lease of facilities, tariff[1] or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof.

(c) *Filing date.* The term *filing date* as used herein shall mean the date on which a rate schedule filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in §35.5. If the material submitted is found to be incomplete, the Director of the Office of Electric Power Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(d) *Posting.* The term *posting* as used herein shall mean, (1) keeping a copy of every rate schedule of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and (2) mailing to each purchaser under a rate schedule a copy of such rate schedule on the date it is sent to this Commission for filing. Posting shall include, in the event of the filing of increased rates or charges, the mailing to each purchaser under a rate schedule or schedules proposed to be changed and to each State Commission within whose jurisdiction such purchaser or purchasers distribute and sell electric energy at retail, a copy of the rate schedule showing such increased rates or charges, comparative billing data as required under this part, and, if requested by a purchaser or State Commission, a copy of the supporting data required to be submitted to this Commission under this part. Upon direction of the Secretary, the public utility shall serve copies of rate schedules and supplementary data upon designated parties other than those specified herein.

(e) *Effective date.* As used herein the *effective date* of a rate schedule shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is permitted by the Commission to become effective as a filed rate schedule. The effective date shall be 60 days after the filing date, or such other date as may be specified by the Commission.

(16 U.S.C. 284(d), 792 et seq.; Pub. L. 95–617; Pub. L. 95–91; E.O. 12009, 42 FR 46267)

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended at 28 FR 11404, Oct. 24, 1963; 43 FR 36437, Aug. 17, 1978; 44 FR 16372, Mar. 19, 1979; 44 FR 20077, Apr. 4, 1979; Order 39, 44 FR 46454, Aug. 8, 1979]

§ 35.3 Notice requirements.

(a) *Rate schedules.* All rate schedules or any part thereof shall be tendered for filing with the Commission and posted not less than sixty days nor more than one hundred-twenty days prior to the date on which the electric service is to commence and become effective under an initial rate schedule or the date on which the filing party proposes to make any change in electric service and/or rate, charge, classification, practice, rule, regulation, or contract effective as a change in rate schedule, except as provided in paragraph (b) of this section, or unless a different period of time is permitted by the Commission. Nothing herein shall be construed as in any way precluding a public utility from entering into agreements which, under this section,

[1] The term *tariff* means a compilation, in book form, of rate schedules of a particular public utility, effective under the Federal Power Act, and a copy of each form of service agreement. In connection herewith, attention is invited to part 154 of this chapter, i.e., the Commission's regulations under the Natural Gas Act, as a guide to the form and composition of a tariff.

may not be filed at the time of execution thereof by reason of the aforementioned sixty to one hundred-twenty day prior filing requirements. The proposed effective date of any rate schedule filing having a *filing date* in accordance with § 35.2(c) may be deferred at the written request of the filing public utility submitted to the Secretary prior to its acceptance by the Commission.

(b) *Construction of facilities.* Rate schedules predicated on the construction of facilities may be tendered for filing and posted no more than one hundred-twenty days prior to the date set by the parties for the contract to go into effect. The Commission, upon request, may permit a rate schedule or part thereof to be tendered for filing and posted more than one hundred-twenty days before it is to become effective.

(16 U.S.C. 284(d); Pub. L. 95–617; Pub. L. 95–91; E.O. 12009, 42 FR 46267)

[44 FR 16372, Mar. 19, 1979; 44 FR 20077, Apr. 4, 1979]

§ 35.4 Permission to become effective is not approval.

The fact that the Commission permits a rate schedule or any part thereof or any notice of cancellation to become effective shall not constitute approval by the Commission of such rate schedule or part thereof or notice of cancellation.

§ 35.5 Rejection of material submitted for filing.

(a) The Secretary, pursuant to the Commission's rules of practice and procedure and delegation of Commission authority, shall reject any material submitted for filing with the Commission which patently fails to substantially comply with the applicable requirements set forth in this part, or the Commission's rules of practice and procedure.

(b) A rate filing that fails to comply with this Part may be rejected by the Director of the Office of Markets, Tariffs, and Rates pursuant to the authority delegated to the Director in § 375.307(k)(3) of this chapter.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 614, 65 FR 18227, Apr. 7, 2000]

§ 35.6 Submission for staff suggestions.

Any public utility may submit a rate schedule or any part thereof or any material relating thereto for the purpose of receiving staff suggestions and comments thereon prior to filing with the Commission.

§ 35.7 Number of copies to be supplied.

All tariffs, rate schedules and contracts, or parts thereof, and material related thereto including any change in rates, certificates of concurrence, notices of cancellation or termination, and notices of succession, shall be supplied to the Commission for filing in six copies. All copies are to be included in one package, together with six copies of the letter of transmittal and all other materials and information required by these regulations, and addressed to the Federal Energy Regulatory Commission, Washington, DC 20426.

[Order 525, 40 FR 8947, Mar. 4, 1975, as amended by Order 541, 57 FR 21734, May 22, 1992]

§ 35.8 Protests and interventions by interested parties and form for Federal Register notice.

(a) *Protests or interventions.* Unless the notice issued by the Commission provides otherwise, any protest or intervention to a rate filing made pursuant to this part must be filed in accordance with §§ 385.211 and 385.214 of this chapter, on or before 21 days after the subject rate filing. A protest must state the basis for the objection. A protest will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestant a party to the proceeding. A person wishing to become a party to the proceeding must file a motion to intervene.

(b) *Form of notice.* The applicant must include a form of notice of the application suitable for publication in the FEDERAL REGISTER in accordance with the specifications in § 385.203(d) of this chapter. The form of notice shall be on electronic media as specified by the Secretary.

[Order 612, 64 FR 72537, Dec. 28, 1999; 65 FR 18229, Apr. 7, 2000, as amended by Order 647, 69 FR 32438, June 10, 2004]

§ 35.9 Identification and numbering of tariffs and rate schedules (including service agreements).

(a) All tariffs and rate schedules (including service agreements) must be numbered sequentially from the beginning of that tariff or rate schedule (or service agreement). Revised service agreements must be replaced in their entirety.

(b) All tariffs and rate schedules (not including service agreements, except as noted in paragraphs (b)(4) and (5) of this section) must have the following information placed in the margins of each sheet:

(1) *Identification.* At the top left of each page, the exact name of the company must be shown, under which must be set forth the words ''FERC Electric Tariff'' or ''Rate Schedule FERC No. ____'' together with volume identification, as appropriate.

(2) *Numbering of sheets.* Except for the title page, at the top right, the sheet number must appear as ''(Original or Revised) Sheet No. (number).'' All sheets must be numbered in the manner set forth in the Tariff, Rate Schedule and Service Agreement Pagination Guidelines, as modified from time to time.

(3) *Issuing officer and issue date.* On the lower left must be placed ''Issued by:'' followed by the name and title of the person authorized to issue the sheet. Immediately below must be placed ''Issued on'' followed by the date of issue.

(4) *Effective date.* On the lower right must be placed ''Effective:'' followed by the specific effective date proposed by the company. Service agreements must include this data on the same sheet containing the service agreement designation.

(5) *Filings made to comply with Commission orders.* Tariffs and rate schedules (including service agreements) filed to comply with Commission orders must carry the following notation in the bottom margin: ''Filed to comply with order of the Federal Energy Regulatory Commission, Docket No. (number), issued (date), (FERC Reports citation).'' Service agreements must include this data on the same sheet containing the service agreement designation.

[Order 614, 65 FR 18227, Apr. 7, 2000]

§ 35.10 Form and style of rate schedules.

(a) Every rate schedule offered for filing with the Commission under this part, shall show on a title page, which shall be otherwise blank, (1) the name of the filing public utility, (2) the names of other utilities rendering or receiving service under the rate schedule; and (3) a brief description of the service to be provided under the rate schedule.

(b) All rate schedules tendered for filing under this part must be printed or otherwise reproduced on 8½ inches wide by 11 inches long white, durable paper so as to result in a clear and permanent record. All copies must be clear, legible, complete, and must show the name(s) of all signatories to executed documents.

(c) At the time a public utility files with the Commission and posts under this part to supersede, supplement, or otherwise change the provisions of a rate schedule previously filed with the Commission under this part, in addition to the other requirements of this part, it must file and post a marked version of the pages to be changed showing additions and deletions. The new language must be marked by either highlight, background shading, bold text, or underlined text. Deleted language must be marked by strike-through. A marked version of the pages to be changed must be included in each copy of the filing required to be filed or posted by this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 568, 59 FR 40240, Aug. 8, 1994]

§ 35.10a Forms of service agreements.

(a) To the extent a public utility adopts a standard form of service agreement for a service other than market-based power sales, the public utility shall include as part of its applicable tariff(s) an unexecuted standard service agreement approved by the Commission for each category of generally applicable service offered by the public utility under its tariff(s). The

standard format for each generally applicable service must reference the service to be rendered and where it is located in its tariff(s). The standard format must provide spaces for insertion of the name of the customer, effective date, expiration date, and term. Spaces may be provided for the insertion of receipt and delivery points, contract quantity, and other specifics of each transaction, as appropriate.

(b) Forms of service agreement submitted under this section shall be in the same format prescribed in § 35.10(b) for the filing of rate schedules.

[Order 2001, 67 FR 31069, May 8, 2002]

§ 35.10b Electric Quarterly Reports.

Each public utility shall file an updated Electric Quarterly Report with the Commission covering all services it provides pursuant to this part, for each of the four calendar quarters of each year, in accordance with the following schedule: for the period from January 1 through March 31, file by April 30; for the period from April 1 through June 30, file by July 31; for the period July 1 through September 30, file by October 31; and for the period October 1 through December 31, file by January 31. Electric Quarterly Reports must be prepared in conformance with the Commission's software and guidance posted and available for downloading from the FERC Web site (*http://www.ferc.gov*).

[Order 2001, 67 FR 31069, May 8, 2002]

§ 35.11 Waiver of notice requirement.

Upon application and for good cause shown, the Commission may, by order, provide that a rate schedule, or part thereof, shall be effective as of a date prior to the date of filing or prior to the date the rate schedule would become effective in accordance with these rules. Application for waiver of the prior notice requirement shall show (a) how and the extent to which the filing public utility and pur- chaser(s) under such rate schedule, or part thereof, would be affected if the notice requirement is not waived, and (b) the effects of the waiver, if granted, upon purchasers under other rate schedules. The filing public utility requesting such waiver of notice shall serve copies of its request therefor upon all purchasers.

Subpart B—Documents To Be Submitted With a Filing

§ 35.12 Filing of initial rate schedules.

(a) The letter of a public utility transmitting to the Commission for filing an initial rate schedule shall list the documents submitted with the filing; give the date on which the service under that schedule is expected to commence; state the names and addresses of those to whom the rate schedule has been mailed; contain a brief description of the kinds of services to be furnished at the rates specified therein; and summarize the circumstances which show that all requisite agreement to the rate schedule or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1.

(b) In addition, the following material shall be submitted:

(1) Estimates of the transactions and revenues under an initial rate schedule. This shall include estimates, by months and for the year, of the quantities of services to be rendered and of the revenues to be derived therefrom during the 12 months immediately following the month in which those services will commence. Such estimates should be subdivided by classes of service, customers, and delivery points and shall show all billing determinants, e.g., kw, kwh, fuel adjustment, power factor adjustment. These estimates will not be required where they cannot be made with relative accuracy as, for example, in cases of interconnection arrangements containing schedules of rates for emergency energy, spinning reserve or economy energy or in cases of coordination and integration of hydroelectric generating resources whose output cannot be predicted quantitatively due to water conditions.

(2)(i) Basis of the rate or charge proposed in an initial rate schedule and an explanation of how the proposed rate or charge was derived. For example, is it a standard rate of the filing public utility; is it a special rate arrived at through negotiations and, if so, were unusual customer requirements or competitive factors involved; and is it designed to produce a return substantially equal to the filing public utility's overall rate of return or is it essentially an increment cost plus a share of the savings rate? Were special cost of service studies prepared in connection with the derivation of the rate?

(ii) A summary statement of all cost (whether fully distributed, incremental or other) computations involved in arriving at the derivation of the level of the rate, in sufficient detail to justify the rate, shall be submitted with the filing, except that if the filing includes nothing more than service to one or more added customers under an established rate of the utility for a particular class of service, such summary statement of cost computations is not required. In all cases, the Secretary is authorized to require the submission of the complete cost studies as part of the filing and each filing public utility shall submit the same upon request by the Secretary in such form as he shall direct.

(3) A comparison of the proposed initial rate with other rates of the filing public utility for similar wholesale for resale and transmission services.

(4) If any facilities are installed or modified in order to supply the service to be furnished under the proposed rate schedule, the filing public utility shall show on an appropriate available map (or sketch) and single line diagram the additions or changes to be made.

(5) In support of the design of the proposed rate, the filing public utility shall submit the same material required to be furnished pursuant to §35.13(h)(37) Statement BL. In addition to the summary cost analysis required by Statement BL, the public utility shall also submit a complete explanation as to the method used in arriving at the cost of service allocated to the sales and service for which the rate or charge is proposed, and showing the principal determinants used for allocation purposes. In connection therewith, the following data should be submitted:

(i) In the event the filing public utility considers certain special facilities as being devoted entirely to the service involved, it shall show the cost of service related to such special facilities.

(ii) Computations showing the energy responsibility of the service, based upon considerations of energy sales under the proposed rate schedule and the kWh delivered from the filing public utility's supply system.

(iii) Computations showing the demand responsibility of the service, and explaining the considerations upon which such responsibility was determined (e.g., coincident or non-coincident peak demands, etc.).

(Federal Power Act, 16 U.S.C. 792–828c; Department of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009, 42 FR 46267; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended at 28 FR 11404, Oct. 24, 1963; Order 537, 40 FR 48674, Oct. 17, 1975; Order 91, 45 FR 46363, July 10, 1980]

§ 35.13 Filing of changes in rate schedules.

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(7) AG—Specified plant accounts (other than plant in service) and deferred debits.
(8) AH—Operation and maintenance expenses.
(9) AI—Wages and salaries.
(10) AJ—Depreciation and amortization expenses.
(11) AK—Taxes other than income taxes.
(12) AL—Working capital.
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(27) BB—Allocation demand and capability data.
(28) BC—Reliability data.
(29) BD—Allocation energy and supporting data.
(30) BE—Specific assignment data.
(31) BF—Exclusive-use commitments of major power supply facilities.
(32) BG—Revenue data to reflect changed rates.
(33) BH—Revenue data to reflect present rates.
(34) BI—Fuel cost adjustment factors.
(35) BJ—Summary data tables.
(36) BK—Electric utility department cost of service, total and as allocated.
(37) BL—Rate design information.
(38) Statement BM—Construction program statement.

(a) *General rule.* Every public utility shall file the information required by this section, as applicable, at the time it files with the Commission under § 35.1 of this part all or part of a rate schedule to supersede, supplement, or otherwise change the provisions of a rate schedule filed with the Commission under § 35.1. Any petition filed under § 385.207 of this chapter for waiver of any provision of this section shall specifically identify the requirement that the applicant wishes the Commission to waive.

(1) *Filing for any rate schedule change not otherwise excepted.* Except as provided in paragraph (a)(2) of this section, any utility that files a rate schedule change shall submit with its filing the information specified in paragraphs (b), (c), (d), (e), and (h) of this section, in accordance with paragraph (g) of this section.

(2) *Abbreviated filing requirements*—(i) *For certain small rate increases.* Any utility that files a rate increase for power or transmission services not covered by paragraph (a)(2)(ii) of this section may elect to file under this paragraph instead of paragraph (a)(1) of this section, if the proposed increase for the Test Period, as defined in paragraph (a)(2)(i)(A) of this section, is equal to or less than $200,000, regardless of customer consent, or equal to or less than $1 million if all wholesale customers that belong to the affected rate class consent.

(A) *Definition:* The *Test Period,* for purposes of paragraph (a)(2)(i) of this section, means the most recent calendar year for which actual data are available, the last day of which is no more than fifteen months before the date of tender for filing under § 35.1 of the notice of rate schedule.

(B) Any utility that elects to file under this subparagraph must file the following information, conforming its submission to any rule of general applicability and to any Commission order specifically applicable to such utility:

(*1*) A complete cost of service analysis for the Test Period, consistent with the requirements of paragraph (h)(36), Statement BK, of this section.

(*2*) A complete derivation and explanation of all allocation factors and special assignments, consistent with the information required in § 35.12(b)(5).

(*3*) A complete calculation of revenues for the Test Period and for the first 12 months after the proposed effective date, consistent with the requirements of paragraph (c)(1) of this section.

(*4*) If the proposed rates contain a fuel cost or purchased economic power adjustment clause, as defined in § 35.14, the company must provide the derivation of its base cost of fuel (Fb) and its monthly fuel factors (Fm) for the Test Period and the resulting fuel adjustment clause revenues. If any pro forma adjustments affect the fuel clause in

any way, the company must show the impact on Fm, kWh sales in the base period (Sm), Fb and kWh sales in the current period (Sb), as well as on fuel adjustment clause revenues.

(*5*) Rate design calculations and narrative consistent with the information required in paragraph (h)(37) of this section and in § 35.12(b)(5).

(*6*) The information required in paragraphs (b), (c)(2) and (c)(3) of this section and in § 35.12(b)(2).

(C) Data shall be reconciled with the utility's most recent FERC Form 1. If the utility has not yet submitted Form 1 for the Test Period, the utility shall submit the relevant Form 1 pages in draft form.

(D) The utility may make pro forma adjustments for post-Test Period changes that occur before the proposed effective date and that are known and measurable at the time of filing. The utility shall provide a narrative statement explaining all pro forma adjustments.

(E) If the utility models its filing in whole or in part on retail rate decisions or settlements, the utility must provide detailed calculations and a narrative statement showing how all retail rate treatments are factored into the cost of service.

(F) If the Commission sets the filing for hearing, the Commission will allow the company a specific time period in which to file testimony, exhibits, and supplemental workpapers to complete its case-in-chief. While not required under this subpart, a utility may elect to submit Statements AA through BM for the Test Period in accord with the requirements of paragraphs (d), (g) and (h) of this section.

(ii) *Rate increases for service of short duration or for interchange or coordination service.* Any utility that files a rate increase for any service of short duration and of a type for which the need and usage cannot be reasonably forecasted (such as emergency or short-term power), or for service that is an integral part of a coordination and interchange arrangement, may submit with its filing only the information required in paragraphs (b), (c) and (h)(37) of this section and in § 35.12(b)(2) and (b)(5), conforming its submission to any rule of general applicability and to any Commission order specifically applicable to such utility.

(iii) *For rate schedule changes other than rate increases.* Any utility that files a rate schedule change that does not provide for a rate increase or that provides for a rate increase that is based solely on a change in delivery points, a change in delivery voltage, or a similar change in service, must submit with its filing only the information required in paragraphs (b) and (c) of this section.

(iv) *Computing rate increases.* For purposes of this subparagraph and paragraph (d)(2)(ii) of this section, the amount of any rate increase shall be the difference between the total revenues to be recovered under the rate schedule change and the total revenues recovered or recoverable under the rate schedule to be superseded or supplemented and shall be determined by:

(A) applying the components of the rate schedule to be superseded or supplemented to the billing determinants for the twelve months of Period I;

(B) Applying the components of the rate schedule change to the billing determinants for the twelve months of Period I; and

(C) Subtracting the total revenues under subclause (A) from the total revenues under subclause (B).

(3) *Cost of service data required by letter.* The Director of the Office of Electric Power Regulation may, by letter, require a utility that is not required under paragraph (a)(1) of this section to submit cost of service data to submit such specified cost of service data as are needed for Commission analysis of the rate schedule change.

(b) *General information.* Any utility subject to paragraph (a) of this section shall file the following general information:

(1) A list of documents submitted with the rate schedule change;

(2) The date on which the utility proposes to make the rate schedule change effective;

(3) The names and addresses of persons to whom a copy of the rate schedule change has been mailed;

(4) A brief description of the rate schedule change;

(5) A statement of the reasons for the rate schedule change;

(6) A showing that all requisite agreement to the rate schedule change, or to the filing of the rate schedule change, including any agreement required by contract, has in fact been obtained;

(7) A statement showing any expenses or costs included in the cost of service statements for Period I or Period II, as defined in paragraph (d)(3) of this section, that have been alleged or judged in any administrative or judicial proceeding to be illegal, duplicative, or unnecessary costs that are demonstrably the product of discriminatory employment practices; and

(8) A form of notice suitable for publication in the FEDERAL REGISTER in accordance with § 35.8 of this part.

(c) *Information relating to the effect of the rate schedule change.* Any utility subject to paragraph (a) of this section shall also file the following information or materials:

(1) A table or statement comparing sales and services and revenues from sales and services under the rate schedule to be superseded or supplemented and under the rate schedule change, by applying the components of each such rate schedule to the billing determinants for each class of service, for each customer, and for each delivery point or set of delivery points that constitutes a billing unit:

(i) Except as provided in clause (ii), for each of the twelve months immediately before and each of the twelve months immediately after the proposed effective date of the rate schedule change, and the total for each of the two twelve month periods; or

(ii) At the election of the utility:

(A) If the utility files Statements BG and BH under paragraph (h) for Period I, for each of the twelve months of Period I instead of for the twelve months immediately before the proposed effective date of the rate schedule change; and

(B) If Period II is the test period, for each of the twelve months of Period II instead of for the twelve months immediately after the proposed effective date of the rate schedule change;

(2) A comparison of the rate schedule change and the utility's other rates for similar wholesale for resale and transmission services; and

(3) If any specifically assignable facilities have been or will be installed or modified in order to supply service under the rate schedule change, an appropriate map or sketch and single line diagram showing the additions or changes to be made.

(d) *Cost of service information*—1) *Filing of Period I data.* Any utility that is required under paragraph (a)(1) of this section to submit cost of service information, or that is subject to the exceptions in paragraphs (a)(2)(i) and (a)(2)(ii) of this section but elects to file such information, shall submit Statements AA through BM under paragraph (h) of this section using:

(i) Unadjusted Period I data; or

(ii) Period I data adjusted to reflect changes that affect revenues and costs prior to the proposed effective date of the rate schedule change and that are known and measurable with reasonable accuracy at the time the rate schedule change is filed, if such utility:

(A) Is not required to and does not file Period II data;

(B) Adjusts all Period I data to reflect such changes; and

(C) Fully supports the adjustments in the appropriate cost of service statements.

(2) *Filing of Period II data.* (i) Except as provided in clause (ii) of this subparagraph, any utility that is required under paragraph (a)(1) of this section to submit cost of service information shall submit Statements AA through BM described in paragraph (h) using estimated costs and revenues for Period II;

(ii) A utility may elect not to file Period II data if:

(A) The utility files a rate increase that is less than one million dollars for Period I; or

(B) All wholesale customers that belong to the affected rate class have consented to the rate increase.

(3) *Definitions.* For purposes of this section:

(i) *Period I* means the most recent twelve consecutive months, or the most recent calendar year, for which actual data are available, the last day of which is no more than fifteen months before the date of tender for filing under § 35.1 of the notice of rate schedule change;

(ii) *Period II* means any period of twelve consecutive months after the end of Period I that begins:

(A) No earlier than nine months before the date on which the rate schedule change is proposed to become effective; and

(B) No later than three months after the date on which the rate schedule change is proposed to become effective.

(4) *Test period.* If Period II data are not submitted for Statements AA through BM, Period I shall be the test period. If Period II data are submitted for Statements AA through BM, Period II shall be the test period.

(5) *Work papers.* A utility that files adjusted Period I data or that files Period II data shall submit all work papers relating to such data. The utility shall provide a comprehensive explanation of the bases for the adjustments or estimates and, if such adjustments or estimates are based on a regularly prepared corporate budget, shall include relevant excerpts from such budget. Work papers and documents containing additional explanatory material shall be cut or folded to letter size, shall be assigned page numbers, and shall be marked, organized and indexed according to:

(A) Subject matter;

(B) The cost of service statements to which they apply; and

(C) Witness.

(6) *Attestation.* A utility shall include in its filing an attestation by its chief accounting officer or another of its officers that, to the best of that officer's knowledge, information, and belief, the cost of service statements and supporting data submitted under this paragraph are true, accurate, and current representations of the utility's books, budgets, or other corporate documents.

(e) *Testimony and exhibits*—(1) *Filing requirements.* (i) A utility subject to paragraph (a)(1) of this section shall file Statements AA through BM under paragraph (h) as exhibits with its rate schedule change and may file any other exhibits in support of its rate schedule change.

(ii) A utility subject to paragraph (a)(1) of this section shall file prepared testimony. Such testimony shall include an explanation of all exhibits, inlcuding Statements AA through BM, and shall include support for all adjustments to book or budgeted data relied on in preparing the exhibits.

(iii) To the extent that testimony and exhibits other than Statements AA through BM duplicate information required to be submitted in such statements, the testimony and exhibits may incorporate such information by referencing the specific statement containing such material.

(2) *Case in chief.* In order to avoid delay in processing rate filings, such cost of service statements, testimony, and other exhibits described in paragraph (e)(1) of this section shall be the utility's case in chief in the event the matter is set for hearing.

(3) *Burden of proof.* Any utility that files a rate increase shall be prepared to go forward at a hearing on reasonable notice on the data submitted under this section, to sustain the burden of proof under the Federal Power Act of establishing that the rate increase is just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act.

(f) *Filing by parties concurring in coordination and interchange arrangements.* For coordination and interchange arrangements in the nature of power pooling transactions, all information required to be submitted in support of a rate schedule change under paragraphs (a)(1), (2), and (3) of this section shall be submitted by each party filing a certificate of concurrence under §35.1. If a representative is designated and authorized in accordance with §35.1 to file supporting information on behalf of all parties to a rate schedule change, such filing shall fulfill the requirement in this paragraph for individual submittals by each party.

(g) *Commission precedents and policy.* If a utility submits cost of service data under paragraph (d) of this section, it shall conform all such submissions to any rule of general applicability and to any Commission order specifically applicable to such utility.

(h) *Cost of service statements.* Any utility subject to paragraph (a)(1) of this section shall submit the following

Statements AA through BM in accordance with the requirements of paragraphs (d) and (g) of this section.

(1) *Statement AA—Balance sheets.* Statement AA consists of balance sheets as of the beginning and the end of both Period I and Period II, and the most recently available balance sheet, including any applicable notes, and an explanation of any significant accounting changes since the most recent filing by the utility under this section that involves the same wholesale customer rate class. Balance sheets shall be constructed in accordance with the annual report form for electric utilities specified in part 141.

(2) *Statement AB—Income statements.* Statement AB consists of income statements for both Period I and Period II, and the most recently available income statement, including any applicable notes, and an explanation of any significant accounting changes since the most recent filing by the utility under this section that involves the same wholesale customer rate class. Income statements shall be prepared in accordance with the annual report form for electric utilities specified in part 141.

(3) *Statement AC—Retained earnings statements.* Statement AC consists of retained earnings statements for both Period I and Period II, and the most recently available retained earnings statement, including any notes applicable thereto. Retained earnings statements shall be prepared in accordance with the annual report form for electric utilities specified in part 141.

(4) *Statement AD—Cost of plant.* Statement AD is a statement of the original cost of total electric plant in service according to functional classification for Period I and Period II. If the plant functions and subfunctions for Period I and Period II are different, the utility shall explain and justify the differences.

(i) For each separately identified function and subfunction of production plant or transmission plant, the utility shall state the original cost as of the beginning of the first month and the end of each month of both Period I and Period II, with an average of the thirteen balances for each period. If any of the Period I or Period II thirteen monthly balances is not available or is unrepresentative of the current plan of the utility for plant in service, the utility shall provide an explanation of the relevant circumstances.

(ii) For each separately identified function and subfunction of plant other than production or transmission, the utility shall state the original cost as of the beginning and the end of both Period I and Period II, with an average of the beginning and end balances for each period. If any of the Period I or Period II balances is not available or is unrepresentative of the current plan of the utility for plant in service, the utility shall provide an explanation of the relevant circumstances.

(iii) The utility shall show the electric plant in service in accordance with each of the following five major functional classifications:

(A) Production;

(B) Transmission;

(C) Distribution;

(D) General and Intangible; and

(E) Common and Other.

(iv) To the extent feasible, the utility shall show completed construction not classified in accordance with clause (iii) in accordance with tentative classification to major functional accounts. If this is not feasible, the utility shall describe such facilities as other plant under clause (iii)(E).

(v) If a utility designs its rate change so that subdivision of the major functional classifications is necessary to support the changed rate, the utility shall supply the original cost information for any of the five major functional plant classifications in clause (iii) that are divided into subfunctional categories. If subfunctional original cost information is provided, the utility shall explain the importance of providing such information to support the changed rate. The utility shall describe each subfunctional category in substantive terms, such as *steam electric production* or *high voltage transmission*.

(vi) The utility shall select any subfunctional categories, as appropriate, under the following criteria:

(A) Production plant categories shall be established as necessary to segregate costs for production services with special characteristics, such as base, intermediate or peaking load.

The utility shall provide a description of each such service and shall list a brief descriptive title for each corresponding subfunctional category.

(B) Transmission plant categories shall be chosen to reflect the extent to which the facilities are proposed to be allocated on a common basis among all or specific segments of utility services. For descriptive purposes, plant may also be categorized according to accounting or engineering terminology, such as *high voltage overhead lines.* The utility shall provide brief descriptive transmission category titles and explain the basis for the titles. If a utility allocates all transmission plant among utility services on the basis of a single set of allocation data, the utility may show original cost in total without subfunctionalization.

(C) Distribution plant categories shall be selected according to engineering or use characteristics meaningful for allocations or assignments to wholesale services such as substations, overhead lines, meters, or non-wholesale. The utility shall provide brief descriptive distribution category titles and shall explain the basis for the titles.

(D) If the utility divides any general, intangible, common, and other plant functional classifications into subfunctional categories, the subfunctional categories shall be chosen to group together facilities that share a common basis for allocation between wholesale and other electric services. The utility shall provide a brief descriptive title for each general and intangible subfunctional category, and for each common and other subfunctional category, with an explanation of the basis of each category selection. A utility need not divide the functional classifications of plant into subfunctional categories if these functions of plant are allocated in Statement BK on the basis of utility labor expenses.

(E) A separate category shall be provided for each specific assignment of plant reported in Statement BE. Such assignments are applicable principally but not necessarily exclusively to distribution facilities. The utility shall provide brief descriptive titles consistent with Statement BE.

(F) A separate category shall be provided for each exclusive-use commitment of major power supply facilities as required to be reported at Statement BF. The utility shall provide brief descriptive titles consistent with Statement BF.

(5) *Statement AE—Accumulated depreciation and amortization.* Statement AE is a statement of the accumulated provision for depreciation and amortization of electric plant for Period I and Period II, provided according to major functional classifications selected by the utility in Statement AD under paragraph (h)(4) and divided into the subfunctional categories selected by the utility in Statement AD, to the extent that subfunctionalized data are available.

(i) For each function and subfunction of electric production and transmission plant in service identified in Statement AD, the utility shall set forth the accumulated depreciation and amortization as of the beginning of the first month and the end of each month of both Period I and Period II. The utility shall state an average for each period computed as the average of the thirteen balances.

(ii) For each function and subfunction of electric plant in service other than production or transmission, identified in Statement AD, the utility shall state the accumulated depreciation and amortization as of the beginning and the end of Period I and Period II, with an average of the beginning and end balances for each period.

(iii) If any of the Period I or Period II balances is not available or is unrepresentative of the current plan of the utility for depreciation reserves, the utility shall provide an explanation of the relevant circumstances.

(iv) If accumulated depreciation and amortization data are not available for any subfunction selected in Statement AD, the utility shall:

(A) Provide a comparison of the current depreciation rate of the major functional classification and the depreciation rate estimated to be appropriate to the subfunctional category; and

(B) State and explain the estimation techniques which the utility proposes

to utilize in the absence of subfunctional data, such as the proration of accumulated depreciation and amortization data among the subfunctional categories according to the data for electric plant in service in Statement AD. If any of the proposed estimation techniques require data that are not provided elsewhere in the cost of service statements in paragraph (h) of this section, the utility shall supply the necessary data in Statement AE.

(6) *Statement AF—Specified deferred credits.* Statement AF consists of balances of specified accounts and items which are to be considered in the determination of the net original cost rate base. All required balances are to be stated as of the beginning and end of both Period I and Period II, with an average of the beginning and end balances for each period. If any of the Period I and Period II balances is not available or is unrepresentative of the current operating plan of the utility, the utility shall include an explanation of the relevant circumstances. If subaccounts are maintained to reflect differences in ratemaking treatment among regulatory authorities that have jurisdiction, balances shall be provided in accordance with such subaccounts, with detailed explanations of the bases upon which the subaccounts were established and are maintained. The balances of deferred credits required to be filed in this statement are described in paragraph (h)(6) (i) through (v) of this section. All references to numbered accounts refer to the Commission's Uniform System of Accounts, 18 CFR part 101.

(i) The utility shall state total electric balances for accumulated deferred investment tax credits Account 255, and shall separate the credits into balances applicable to pre-1971 and post-1970 qualifying property additions. If the utility maintains records to show Account 255 component balances according to the major functional classifications identified in Statement AD under paragraph (h)(4), the utility shall provide the component balances by function. If the data are not available by function, the utility shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balances obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall supply in Statement AF the necessary data, such as historical functional patterns of plant additions eligible for the tax credits. The utility shall state whether the Internal Revenue Code General Rule, §46(f)(1), is applicable with respect to restrictions on credit treatment for ratemaking purposes. If the General Rule is not applicable, the utility shall state which election it has made with respect to special rules for ratable or immediate flow-through for ratemaking purposes.

(ii) The utility shall state the total electric component balances for accumulated deferred income tax Account 281 pertaining to accelerated amortization property. The utility shall show separate components for defense, pollution control, and other facilities. The utility shall show balances for each component and totaled for the electric utility department. If the utility maintains records to show Account 281 component balances according to the major functional classifications identified in Statement AD under paragraph (h)(4), the utility shall provide such component balances. If data are not available by function, the utility shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balances obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall supply in Statement AF the necessary data.

(iii) The utility shall state the total electric component balances for accumulated deferred income tax Account 282 pertaining to electric utility property other than accelerated amortization property. The utility shall itemize the balances in Account 282, to the extent data are available, in detail sufficient to identify the specific major properties involved and shall list the

balances according to the accounting entries, such as liberalized depreciation, for which interperiod tax allocation was used and included in this account. Component balances shall be shown individually and in total for the electric utility department. If the utility maintains records to show account 282 component balances according to the major functional classifications identified in Statement AD under paragraph (h)(4), the utility shall provide such component balances by function. If the data are not available by function, the utility shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balances obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall supply in Statement AF the necessary data, such as historical functional patterns of plant additions.

(iv) The utility shall state the total electric component balances for accumulated deferred income tax Account 283 pertaining to interperiod income tax allocations not related to property. The utility shall itemize in detail balances in Account 283, to the extent data are available, and shall list the balances according to the accounting entries for which interperiod tax allocation was used and included in this account. Component balances shall be shown individually and in total for the electric utility department. If the utility maintains records to show Account 283 component balances according to the major functional classifications identified in Statement AD under paragraph (h)(4), the utility shall provide such component balances by function. If the data are not available by function, the utility shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balances obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the filing shall supply in Statement AF the necessary data.

(v) The utility shall show electric utility balances for every other item that the utility believes should be included in Statement AF. The utility shall explain the reasons for inclusion of each item.

(7) *Statement AG—Specified plant accounts (other than plant in service) and deferred debits.* Statement AG is a statement of balances of specified accounts and items that are to be considered in the determination of the net original cost rate base. Except as prescribed in clause (ii), the utility shall state all required balances as of the beginning and the end of Period I and Period II, with an average of the beginning and end balances for each period. If any of the Period I or Period II balances is not available or is unrepresentative of the current operating plan of the utility, the utility shall provide a full explanation of the relevant circumstances. If subaccounts are maintained to reflect differences in ratemaking treatment among regulatory authorities having jurisdiction, the utility shall provide balances in accordance with such subaccounts, with detailed explanations of the bases upon which the subaccounts were established and are maintained. The balances required to be submitted under Statement AG are described in clauses (7)(i) through (vi).

(i) For each separately identified major functional classification selected by the utility in Statement AD, the utility shall state the electric utility land and land rights balances for electric plant held for future use in account 105. If itemized in detail, balances shall be totaled for each major functional classification.

(ii) The utility shall state the electric utility component balances in Accounts 107 and 120.1, individually and in total, for each item of construction work in progress for pollution control facilities, fuel conversion facilities, or any other facilities that qualify for inclusion in rate base under §35.26. The utility shall state such balances for each major functional and subfunctional classification under Statement AD as of the beginning of the first

month and the end of each month of Period I and Period II with an average of the 13 balances for each period.

(iii) For each major functional classification under Statement AD and with respect to property otherwise includable in plant in service, the utility shall state the balances for extraordinary property losses Account 182. If itemized in detail, balances shall be totaled for each major functional classification. The utility shall provide information about Commission authorization for any loss included in Account 182 and shall state when the loss was claimed for tax purposes.

(iv) The utility shall state the total electric component balances for accumulated deferred income taxes Account 190. The component balances in Account 190 shall be itemized in detail and listed according to the accounting entries for which interperiod tax allocation was used. Component balances shall be shown individually and in total for the electric utility department. If the utility maintains records to show Account 190 component balances according to the major functional classifications identified in Statement AD under paragraph (h)(4), the utility shall provide such component balances by function. If the data are not available by function, the filing utility shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balances obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall supply in Statement AG the necessary data.

(v) Balances shall be shown for every other item that the utility believes should be included in Statement AG. The utility shall provide support for inclusion of each item, and a brief descriptive title for each such item.

(8) *Statement AH—Operation and maintenance expenses.* Statement AH is a statement of electric utility operation and maintenance expenses for Period I and Period II provided according to the accounts prescribed by the Commission's Uniform System of Accounts, 18 CFR part 101.

(i) For Period I and Period II, the utility shall itemize and subtotal all operation and maintenance expenses according to the major functional classifications of Statement AD in paragraph (h)(4) and the subfunctional categories of those classifications. The utility shall further divide the operation and maintenance expenses itemized under the production classification and each of its subfunctional categories to reflect expenses relating to the energy component (list each item by account number and compute fuel costs on an as-burned basis), the demand component, and any other production expenses.

(ii) For Period I and Period II, the utility shall report production operation and maintenance expenses according to appropriate account numbers. The utility shall apply the following principles in developing Period I and Period II production operation and maintenance data for this statement:

(A) Total production operation and maintenance expenses shall be segregated into energy, demand, and other components. The utility shall specifically state and support its criteria for classifications between energy and demand, and for use of the production *other* classification, such as specific assignments related to sales from particular generating units.

(B) Fuel expense for cost of service purposes shall be the total as-burned expense incurred. If the utility defers a portion of such expense for accounting purposes, the deferral amount shall be separately stated and accompanied by material that shows computational detail in support of such amount. If claimed nuclear fuel expense reflects a change in the estimated net salvage value of nuclear fuel, the utility shall show the amounts involved and explain the relevant circumstances.

(C) If the amount of production fuel expense is significantly affected by abnormal Period I water availability for hydroelectric generation, the utility shall explain how water availability was taken into account in developing projected Period II production fuel expenses.

(iii) For Period I and Period II, the utility shall report operation and maintenance expenses attributable to the transmission and distribution functions according to appropriate account numbers. If Period II transmission and distribution plant data are not provided by subfunctional category in Statement AD, the utility need only provide for Period II total operation and maintenance expenses for each function.

(iv) For Period I and Period II, the utility shall report in total for each period, operation and maintenance expenses incurred under each of the categories of customer accounting, customer service and information, and sales.

(v) For Period I and Period II, the utility shall itemize administrative and general expenses by groups that are directly assignable, such as regulatory Commission expenses, or that are related to selected plant or expense items for which an allocation to wholesale services is independently determinable, such as items related to labor expense or to a category of production plant in service. Administrative and general expenses shall include a detailed itemization of the general advertising Account 930.1 and the miscellaneous general expenses Account 930.2. If Account 930 data are not projected on a detailed basis for Period II, the utility shall provide its best estimate of the Account 930.1 expense items and a descriptive list of expense items anticipated as miscellaneous general expenses in Account 930.2. Where applicable, separate items shall be shown for general plant maintenance, and for common and other plant maintenance.

(vi) In addition to annual production data for Period I and Period II, the utility shall provide monthly expense data by accounts for fuel in Accounts 501, 518, and 547 and purchased power in Account 555. For each type of transaction, such as firm power or economy interchange power, monthly purchased power expense data shall be subtotaled separately for interchange receipts and deliveries. For monthly fuel Accounts 501, 518, and 547, and for each type of purchased power transaction, the monthly data shall identify components to be claimed under the fuel adjustment clause of the utility.

(9) *Statement AI—Wages and salaries.* Statement AI consists of statements of the electric utility wages and salaries, for Period I and Period II, that are included in operation and maintenance expenses reported in Statement AH.

(i) For Period I and Period II, the utility shall show the distribution of wages and salaries by function according to the form prescribed for operation and maintenance expenses by the Commission's Uniform System of Accounts, 18 CFR part 101. The statement shall also include by function additional wages and salaries attributable to common and other plant classifications identified in Statement AD in paragraph (h)(4).

(ii) For Period I and Period II, the utility shall show total production wages and salaries, itemized and subtotaled into energy and demand related components in accordance with classifications of Statement AH operation and maintenance production expenses of which production wages and salaries are a part.

(10) *Statement AJ—Depreciation and amortization expenses.* Statement AJ consists of statements of depreciation and amortization expenses for Period I and Period II.

(i) For Period I and Period II, the utility shall show the depreciation and amortization expenses and the depreciable plant balances of the filing utility, in accordance with major functional classifications selected by the utility in Statement AD under paragraph (h)(4).

(ii) The utility shall divide the major functional classifications of depreciation and amortization expenses shown in clause (i) into the subfunctional categories selected by the utility for electric plant in service in Statement AD, to the extent such data are available.

(iii) If depreciation and amortization expense data are not available for any subfunctional category selected in Statement AD, the utility shall:

(A) Provide a comparison of the current depreciation rate of the major functional classification and the depreciation rate estimated to be appropriate to the subfunctional category; and

(B) State and explain the estimation techniques that the utility utilized in developing each estimated subfunctional depreciation rate. If utilization of such estimation techniques requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall supply such data in Statement AJ.

(iv) For Period I and Period II, the utility shall show the annual depreciation rate applicable to each function and subfunction for which depreciation expense is reported. The utility shall indicate the bases upon which the depreciation rates were established. If the depreciation rates used for Period I or Period II data differ from those employed to support the utility's prior approved jurisdictional electric rate, the utility shall include in or append to Statement AJ detailed studies in support of such changes. These detailed studies shall include:

(A) Copies of any reports or analyses prepared by any independent consultant or utility personnel to support the proposed depreciation rates; and

(B) A detailed capital recovery study showing by primary account the depreciation base, accumulated provision for depreciation, cost of removal, net salvage, estimated service life, attained age of survivors, accrual rate, and annual depreciation expense.

(11) *Statement AK—Taxes other than income taxes.* Statement AK consists of statements of taxes other than income taxes for Period I and Period II.

(i) For Period I and Period II, the utility shall itemize and total any taxes other than income taxes according to clauses (i) (A) through (D).

(A) *Revenue taxes.* The utility shall show total revenue taxes levied by each taxing authority and identify the revenue taxes, under both the present and changed rate, applicable to wholesale services for which a rate change is filed. The utility shall identify revenue taxes associated with each revenue credit item reported in Statement AU under paragraph (h)(21).

(B) *Real estate and property taxes.* The utility shall itemize and total all real estate and property taxes. If the utility maintains records to show tax component balances according to the major functional classifications identified in Statement AD under paragraph (h)(4), the utility shall supply the component balances by function. If the data are not available by function, the utility shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balances obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall supply the necessary data in Statement AK.

(C) *Payroll taxes.* The utility shall itemize and total all payroll taxes. If the utility maintains records to show tax component balances according to the major functional classifications identified in Statement AD in paragraph (h)(4), the utility shall provide the component balances by function. If the data are not available by function, the utility shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balances obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall provide the necessary data in Statement AK.

(D) *Miscellaneous taxes.* The utility shall itemize and total all miscellaneous taxes which are directly assignable or which are related to any selected plant or expense item for which an allocation to wholesale services is independently determinable, such as items related to transmission plant in service or to net distribution plant.

(ii) If any of the taxes itemized under clause (11)(i) are levied by a taxing authority that is a customer, or is related to a customer, whose services would be affected by the changed rate schedule, the utility shall show amounts of such taxes according to the taxing authority, identify the related customer, and provide an explanation of the relevant circumstances.

(12) *Statement AL—Working capital.* Statement AL consists of statements for Period I and Period II designed to

establish the need for working capital to maintain adequate levels of operating supplies, to meet required prepayments, and to meet ongoing cash disbursements that must be made at a time different than related revenue receipts for utility services rendered.

(i) *Supplies and prepayments.* The utility shall supply statements to show monthly balances of operating supplies and prepayments itemized under clauses (i) (A) through (C). The utility shall state all required balances as of the beginning of the first month and the end of each month of both Period I and Period II, with an average of the thirteen balances for each period. If any of the Period I or Period II balances is not available or is unrepresentative of the current operating plan of the utility for supplies or prepayments, the utility shall include an explanation of the relevant circumstances. Operating supply and prepayment balances shall be itemized under the following categories:

(A) *Fuel supplies.* The utility shall state the fuel supply balances for each type of electric utility production plant, except hydraulic. The utility shall describe its overall fossil fuel supply objectives for Period I and Period II, in terms of projected average days of burn for major fossil fuel generating stations, if feasible. The utility shall explain substantial differences, if any, between actual Period I inventories and the target objectives, or between Period II objectives and Period I objectives. Nuclear fuel balances shall include fuel in stock, fuel in the reactor and spent fuel in the process of cooling in Accounts 120.2, 120.3, 120.4, less accumulated provisions for amortization of nuclear fuel assemblies in Account 120.5.

(B) *Plant materials and operating supplies.* The utility shall state materials and operating supply balances for each of the major electric utility operating functions of production, transmission, and distribution, and for each significant type of miscellaneous operating supplies. Miscellaneous supplies shall be grouped to facilitate suitable allocations or assignments among utility services.

(C) *Prepayments.* The utility shall indicate prepayment balances for each major prepayment item, with a brief description of the item. Balances shall be grouped and subtotaled to facilitate suitable allocations or assignments among utility services.

(ii) *Cash working capital.* The utility shall indicate average monthly working cash requirements that reflect the extent to which day-to-day operational utility service revenues are received later or earlier than cash disbursements necessary to provide the services, with an explanation of how such requirements are derived.

(13) *Statement AM—Construction work in progress.* Statement AM is a statement of the amount of construction work in progress described according to functional classification for Period I and Period II. For production plant and transmission plant, the utility shall state the balances as of the beginning of the first month and the end of each month of both Period I and Period II, with an average of the 13 balances for each period. For each function of plant identified in Statement AD other than production or transmission, the utility shall state the balances as of the beginning and the end of both Period I and Period II, with an average of the beginning and end balances for each period. If any Period I or Period II balance is not available, the utility shall include monthly estimates and an explanation of the relevant circumstances. Pollution control facilities, fuel conversion facilities, or other construction amounts reported in Statement AG shall be excluded from amounts reported in this Statement.

(14) *Statement AN—Notes payable.* Statement AN is a statement of the electric utility portion of average notes payable for Period I and Period II. The utility shall indicate balances as of the beginning of the first month and the end of each month of both Period I and Period II, with an average of the thirteen balances for each period. If any of the Period I or Period II balances is not available or is unrepresentative of the current financing plan of the utility, the utility shall provide an explanation of the relevant circumstances. If a utility has operations other than electric, the utility shall also show allocations between electric and other utility departments on an

appropriate basis, such as the average amount of construction work in progress and net plant.

(15) *Statement AO—Rate for allowance for funds used during construction.* Statement AO is a statement of the basis of the rate for computing the allowance for funds used during construction (AFUDC) for Period I and Period II.

(i) The utility shall show the computations of the maximum rates for the construction allowances computed in accordance with plant instructions of the Commission's Uniform System of Accounts, 18 CFR part 101. The utility shall show the rates computed annually, and shall provide the rates for each annual period that includes any part of Period I or Period II. If the utility proposes to use a net-of-tax rate, the utility shall show the derivation for both the gross-of-tax and net-of-tax rates.

(ii) If the book allowance amounts of AFUDC do not reflect the maximum rates for allowances for funds computed in accordance with clause (i), the utility shall show the derivation for the actual rates utilized in computing AFUDC, including derivation of any net-of-tax rate utilized by the utility.

(16) *Statement AP—Federal income tax deductions—interest.* Statement AP is a statement of electric utility interest charges for Period I and Period II. For each period, the utility shall state the total electric utility interest in terms of three or more component items described in clauses (i) through (iv).

(i) The utility shall state the allowance for borrowed funds used for electric utility construction Account 432 as a separate component. The utility shall show supporting detail, including computation of the amounts on the basis of AFUDC rates claimed in Statement AO.

(ii) The utility shall state interest for borrowed funds used for electric utility construction Account 431 as a separate component. If applicable, the utility shall also show all elements of Account 431 related to purposes other than electric utility construction, with detailed supporting material, such as a computation of allocations between electric and other utility departments with explanatory material to support the bases of such allocations.

(iii) The utility shall state the interest on long-term debt required for electric rate base investment as a separate component. The interest amount shall be consistent with that shown and utilized in Statement BK under paragraph (h)(36) of this section.

(iv) The utility shall show other interest items appropriate in the determination of net taxable income allocable to the wholesale services at issue. The utility shall describe and support each item and shall accompany each item with a statement of the basis on which the item is allocable to the wholesale services. The utility shall also list a short descriptive title for each item.

(17) *Statement AQ—Federal income tax deductions—other than interest.* Statement AQ is a statement of other deductions from net operating income before Federal income taxes, for Period I and Period II, which deductions are appropriate in determining the net taxable income allocable to the wholesale services subject to the changed rate. The utility shall show unallowable deductions as negative entries in this statement. The utility shall itemize deductions in accordance with clause (i) through (iii) and individually identify each by a brief descriptive title.

(i) The utility shall report, as a separate component of this statement, the difference between tax and book depreciation, in total, or in individual amounts based on the Internal Revenue Code provisions that permit the utility to use various methods of computing depreciation for tax purposes, such as liberalized depreciation or the asset depreciation range. If the utility reports the differences in total only, it shall list the specific Internal Revenue Code provisions that result in the difference.

(ii) The utility shall state taxes and pensions capitalized as a separate component.

(iii) The utility shall describe and support other deduction items appropriate in the determination of net taxable income allocable to the wholesale services. Each item shall be accompanied by a brief explanation of the basis on which the item is allocable to the wholesale services.

(18) *Statement AR—Federal tax adjustments.* Statement AR is a statement of adjustments to Federal income taxes for Period I and Period II. If subaccounts are maintained to reflect differences in ratemaking treatment among regulatory authorities having jurisdiction, the utility shall provide adjustment amounts in accordance with such subaccounts. The utility shall report detailed explanations of the bases upon which the subaccounts were established and are maintained.

(i) For each major function of plant identified in Statement AD under paragraph (h)(4), the utility shall state the electric utility component adjustment for the Federal portions of the provision for deferred income tax Account 410.1. If the data are not available by function, the utility shall state the amounts for the total electric utility and shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balances obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall supply in Statement AR the necessary data. The utility shall provide the adjustment amounts for total electric and, to the extent available for each such major functional component, accompanied by summary totals segregated in accordance with related balance sheet Accounts 281, 282, 283, and 190 [*see* Statements AF and AG]. Account 190 items require a negative sign for entries in Statement AR. The utility shall identify the summarized items by account number.

(ii) The utility shall provide for the Federal portions of the provision for deferred income tax-credit Account 411.1 the data required by clause (i) for Account 410.1.

(iii) For each major functional classification of plant identified in Statement AD under paragraph (h)(4), the utility shall provide the electric utility component for investment tax credits generated for Period I and Period II, credits utilized for each period, and the allocations to current income for each period. If the data are not available by function, the utility shall state the amounts for total electric utility and shall describe the procedure by which the utility believes it can reasonably estimate the portion of the total electric balances for each major functional classification. The utility may show by function the component balance obtained by applying the procedure. If such estimation requires data that are not provided elsewhere in the cost of service statements in this paragraph, the utility shall supply in Statement AR the necessary data. If itemized in detail, balances shall be subtotaled for each major function, and totaled for the electric utility department. Detailed data shall be consistent with that provided in Statement AF under paragraph (h)(6) of this section.

(iv) The utility shall list and designate as other adjustment items any additional Federal income tax adjustments and shall provide a brief descriptive title for each item. The utility shall explain the reasons for inclusion of each item, and shall indicate the basis on which each will be assigned or allocated to the wholesale services subject to the changed rate and to the other electric utility services.

(19) *Statement AS—Additional state income tax deductions.* Statement AS is a listing of state income tax deductions for Period I and Period II, in addition to those listed at Statements AP and AQ for Federal tax purposes. The utility shall explain the reasons for inclusion of each item. The utility shall indicate the basis on which each item is to be assigned or allocated to the wholesale services at issue and to the other electric utility services. If applicable, the utility shall show unallowable deductions as negative entries in this statement. The utility shall provide the percentage of Federal income tax payable which is deductible for state income tax purposes, if applicable. [*See also* Statement AY, dealing with tax rate data.]

(20) *Statement AT—State tax adjustments.* Statement AT is a statement of adjustments to state income taxes for Period I and Period II. The utility shall prepare and present the data in statement AT as prescribed for Federal tax adjustments in Statement AR. The

utility shall annotate Statement At data as necessary to identify state tax adjustments that are not properly deductible for Federal tax purposes.

(21) *Statement AU—Revenue credits.* Statement AU is, for Period I and Period II, a statement of the operating revenue balances in Accounts 450 through 456, and other revenue items, such as short-term sales in Account 447, that are appropriately credited to the cost of service for determinations of costs allocable to the wholesale services subject to the changed rate. The utility shall include revenue credits proposed for exclusive-use commitment of major power supply facilities according to instructions for preparation of Statement BF under paragraph (h)(31) of this section. When applicable, the utility shall state revenue taxes for each revenue credit item. The utility shall explain the reasons for inclusion of each item, and shall indicate the basis for assigning or allocating each item to the wholesale services subject to the changed rate and to the other electric utility services.

(22) *Statement AV—Rate of return.* Statement AV is a statement and explanation of the percentage rate of return requested by the utility. The utility shall provide the complete capital structure, including ratios, component costs and weighted component costs claimed by the utility. The utility shall submit additional data where any component of the capital of the utility is not primarily obtained through its own financing, but is primarily obtained from a company by which the utility is controlled, as defined in the Commission's Uniform System of Accounts, 18 CFR part 101. The utility shall submit the additional data, if required with respect to the debt capital, preferred stock capital and common stock capital of such controlling company or any intermediate company through which such funds have been secured.

(i) *General.* The utility shall show, based on the capitalization of the utility, the cost of debt capital and preferred stock capital, the claimed rate of return on the common equity of the utility and the resulting overall rate of return requested.

(A) For Period I and, if applicable, Period II, the utility shall show in tabular form the following:

(*1*) Cost of each capital element, including claimed rate of return on equity capital;

(*2*) Capitalization amounts and ratios;

(*3*) Weighted cost of each capital element; and

(*4*) Overall claimed rate of return.

(B) When a Period II filing is submitted the utility shall provide:

(*1*) A full explanation of, and supporting work papers for, the *pro forma* adjustments to the actual capitalization data to arrive at the Period II capitalization; and

(*2*) The *pro forma* adjustment to Period I data to arrive at the Period II amount for unappropriated undistributed subsidiary earnings in Account 216.1.

(C) If not included elsewhere in the filing, the utility shall submit the amount for Account 216.1 for Period I as part of this statement.

(ii) *Debt capital.* (A) The utility shall show the weighted cost for all issues of long-term debt capital as of the end of Period I, as expected on the date the changed rate is filed, and, if applicable, as estimated for the end of Period II. The weighted cost is calculated by: (*1*) Multiplying the cost of money for each issue under clause (B)(*6*) below by the principal amount outstanding for each issue, which yields the annualized cost for each issue; and (*2*) adding the annual cost of each issue to obtain the total for all issues, which is divided by the total principal amount outstanding for all issues to obtain the weighted cost for all issues.

(B) The utility shall show the following for each class and series of long-term debt outstanding as of the end of Period I, as expected on the date the changed rate is filed, and, if applicable, as estimated to be outstanding as of the end of Period II.

(*1*) Title;

(*2*) Date of offering and date of maturity;

(*3*) Interest rate;

(*4*) Principal amount of issue;

(*5*) Net proceeds to the utility;

(*6*) Cost of money, which is the yield to maturity at issuance based on the

interest rate and net proceeds to the utility determined by reference to any generally accepted table of bond yields;

(*7*) Principal amount outstanding;

(*8*) Name and relationship of issuer and if the debt issue was issued by an affiliate; and

(*9*) If the utility has acquired at a discount or premium some part of the outstanding debt which could be used in meeting sinking fund requirements, or for some other reason, the annual amortization of the discount or premium for each issue of debt from the date of the reacquisition over the remaining life of the debt being retired. The utility shall show separately the total discount and premium to be amortized, and the amortized amount applicable to Period I and, if applicable, Period II.

(C) The utility shall show the before-tax interest coverage, for the twelve months of Period I based on the indenture requirements. The utility shall provide a copy of the work papers used to make the calculations, with explanations appropriate to understand the calculations.

(iii) *Preferred stock and preference stock capital.* (A) This statement shall show the weighted cost for all issues of preferred and preference stock capital as of the end of Period I, as expected on the date the changed rate is filed, and, if applicable, as estimated for the end of Period II. The weighted cost is calculated by: (*1*) Multiplying the cost of money for each issue under clause (B)(*9*) by the par amount outstanding for each issue, which yields the annualized cost for each issue; and (*2*) adding the annual cost of each issue to obtain the total for all issues, which is divided by the total par amount outstanding for all issues to obtain the weighted cost for all issues.

(B) The statement shall show for each class and issue of preferred and preference stock outstanding as of the end of Period I, as expected on the date the changed rate is filed, and, if applicable, as estimated to be outstanding as of the end of Period II:

(*1*) Title;

(*2*) Date of offering;

(*3*) If callable, call price;

(*4*) If convertible, terms of conversion;

(*5*) Dividend rate;

(*6*) Par or stated amount of issue;

(*7*) Net proceeds to the filing utility;

(*8*) Ratio of net proceeds to gross proceeds received by the filing utility;

(*9*) Cost of money (dividend rate divided by the ratio of net proceeds to gross proceeds for each issue);

(*10*) Par or stated amount outstanding; and

(*11*) If issue is owned by an affiliate, name and relationship of owner.

(iv) *Common stock capital.* This statement shall show the following information for each sale of common stock during the five-year period preceding the date of the balance sheet for the end of Period I and for each sale of common stock between the end of Period I and the date that the changed rate is filed:

(A) Number of shares offered;

(B) Date of offering;

(C) Gross proceeds at offering price;

(D) Underwriters' commissions;

(E) Dividends per share;

(F) Net proceeds to company;

(G) Issuance expenses; and

(H) Whether issue was offered to stockholders through subscription rights or to the public and whether common stock was issued for property or for capital stock of others.

(v) *Supplementary financial data.* The utility shall submit a statement indicating the sources and uses of funds for Period I and as estimated for Period II and a copy of the utility's most recent annual report to the stockholders. The utility shall also supply a prospectus for its most recent issue of securities and a copy of the latest prospectus issued by any subsidiary of the filing utility or by any holding company of which the filing utility is a subsidiary.

(23) *Statement AW—Cost of short-term debt.* In Statement AW, the utility shall provide a statement of the cost of capital rate for short-term debt of the utility as of the end of Period I, as expected on the date the proposed rate is filed, and, if applicable, as estimated for the end of Period II, with details supporting each stated cost. The short-term debt rate shown in Statement AW shall include only the short-term debt that appears on the income statement

as interest expense and shall not include nominal forms of financing, such as trust agreements.

(24) *Statement AX—Other recent and pending rate changes.* Statement AX is a statement describing the extent to which operating revenues are subject to refund for Period I and, if applicable, Period II, for each rate change filed with any Federal, state, or other regulatory body that has jurisidiction. The utility shall list and submit any orders in which applications for a rate increase have been acted on by any regulatory body during Period I, Period II, or the interval between Period I and Period II, and a copy of each transmittal letter or equivalent written document by which a utility summarized and submitted any pending applications that have not been acted on. Statement AX shall reflect information available at the time of submittal under this paragraph. Notwithstanding any other provision of this section, Statement AX is required to be filed only if the proposed rate design tracks retail rates.

(25) *Statement AY—Income and revenue tax rate data.* (i) Statement AY is a statement of tax rate data for Period I and Period II arranged as follows:

(A) Nominal Federal income tax rate;

(B) Nominal state income tax rate;

(C) Proportion of Federal income taxes payable which is deductible for state income tax purposes. If an allowable deduction is stated in other terms, the utility shall provide an estimate of the effective deduction as a percentage of Federal tax payable; and

(D) Revenue tax rate. If the revenue tax rate is scaled, the utility shall show approximate weighted average rates for relevant revenue levels and full supporting data.

(ii) If the utility serves in more than one jurisdiction for revenue or state income tax purposes, the utility shall state the appropriate tax rates for each wholesale customer group at issue and for all other customers as a composite group. [*See*, Statement BA under paragraph (h)(26) for wholesale customer grouping criteria.] If there are any changes in tax rates that occur in Period I or that may occur in Period II, the utility shall describe such changes and the effective date of the changes.

(26) *Statement BA—Wholesale customer rate groups.* (i) Statement BA is a list of wholesale customers by group for the purpose of:

(A) Allocating the allowable costs of the utility to such customer groups on the basis of electric utility services rendered; and

(B) Comparing proposed revenues from each customer group with the cost of service as allocated to that group.

(ii) The utility shall limit the number of wholesale customer groups listed to the minimum required under the following criteria:

(A) At least one customer group shall be specified for each separate wholesale rate subject to the changed rate filing.

(B) In general, all customers proposed to be served on the same rate shall be included in a common group. If the utility believes that there are significant differences in services provided under the same rate, the utility shall subdivide the common group served by the same rate into separate customer groups characterized by the type of service provided each group and shall demonstrate whether the common rate is cost-based by means of cost-justification for each service group. Certain customer groupings, such as cooperatives or municipals, may also be utilized to facilitate purchaser evaluations of the changed rate.

(C) In all cases, the utility shall select customer groupings on a basis consistent with rate design information provided in Statement BL under paragraph (h)(37) of this section.

(iii) The utility shall enumerate all wholesale customer rate groups, together with a brief descriptive title for each group. For example:

Group 1. Full Requirements Tariff FR–1.

Group 2. Partial Requirements Tariff PR–1.

(27) *Statement BB—Allocation demand and capability data.* Statement BB is a statement of electric utility demand and capability data for Period I and Period II to be considered as a basis for allocating related costs to the wholesale services subject to the changed rate.

(i) For each month of Period I and Period II, with an average for each period, the utility shall show the maximum peak firm kilowatt demand on the power supply system of the utility, and the kilowatt demands of the wholesale services that coincide with the system monthly maximum power supply demand, including for Period I the date and hour for such coincidental peak demands. The utility shall state these kilowatt demands in terms of 60-minute intervals or other intervals adjusted to the equivalent of 60 minutes. The utility shall not include in the data the demands associated with interruptible power supply services, firm or nonfirm transmission wheeling services, or demands associated with other services the revenues from which are shown as revenue credits in Statement AU under paragraph (h)(21). The utility shall provide wholesale service demand data as follows:

(A) The wholesale service data for each individual customer delivery point or set of delivery points that constitutes an individual wholesale customer billing unit shall include demands at delivery. The individual customer wholesale service data shall be summarized and subtotaled in accordance with Statement BA customer groupings.

(B) The data supplied for each wholesale customer group under clause (A) shall be adjusted for losses to reflect demand at the power supply level. The data shall be totaled to show total customer group demand at power supply level for each month of Period I and Period II.

(ii) To the extent such data are available, the utility shall state Period I and Period II monthly maximum demand data for interruptible power supply services, firm wheeling services, and nonfirm wheeling services. The utility shall also provide, to the extent data are available, firm wheeling demand data for any of the 60-minute periods that coincide with the times of power supply peak demands shown under clause (i). The utility shall indicate the basis of all demands, such as metered demands or contract demands, reported under this clause. For interruptible services, the utility shall provide a description of the conditions under which service may be interrupted or curtailed. The utility shall include available information on actual interruptions or curtailments during a three-year period that includes Period I. If any of the wholesale rates at issue are for interruptible or curtailable service, the utility shall provide any demand data specifically relevant to such service.

(iii) If a utility establishes plant categories in Statement AD under paragraph (h)(4) of this section for the purpose of supporting wholesale rates for firm power supply services with special characteristics, such as base load, intermediate, or peaking, the utility shall provide in Statement BB the demand data required by clause (i) in total and in separate corresponding demand values consistent with the service characteristics. Corresponding values shall be stated for the system demand of the utility, and for each applicable wholesale service group.

(iv) If a utility establishes plant categories in Statement AD under paragraph (h)(4) of this section for the purpose of supporting wholesale rates for nonfirm power supply services, such as capacity sales, the utility shall include in Statement BB for each month of Period I and Period II the monthly capability data relied on by the utility in developing costs allocable to such rates, with an explanation of the underlying cost allocation rationale.

(v) If a utility establishes production plant categories in Statement AD under paragraph (h)(4) of this section for the purpose of supporting wholesale rates based on specialized ratemaking theories such as marginal cost pricing, time-of-day pricing, or base, intermediate, and peaking characteristics, the utility shall include in Statement BB all demand and capability data relied on by the utility in developing support on a cost of service basis, with appropriate explanatory material.

(vi) For each month of Period I and Period II, the utility shall provide any additional demand data that the utility believes to be relevant to the allocation of electric utility costs to the wholesale services at issue. The utility shall fully support all such data and shall explain the rationale and the specific application proposed.

(vii) Based upon information reported in Statements BB and BC, the utility shall list selected months that are normally the months of greatest significance in determining the need of the utility for power supply capability throughout the year. All twelve months may be selected, if appropriate. In its selection, the utility shall take into account any effects of local weather seasons and, particularly, the extent to which peak demands may tend to be similar in magnitude in two or more months of a weather season. The utility shall explain the reasons for the selections and describe the significance for the selections of seasonal variations in the weather.

(28) *Statement BC—Reliability data.* Statement BC is a statement relating to reference standards of the filing utility for electric power supply reliability, and to information designed to reflect monthly availability of generating capacity reserves.

(i) For Period II, Period I, and each of the three calendar years preceding Period I, the utility shall state and briefly explain its objective reference standard of production power supply reliability and the rationale underlying its choice of a reliability standard, including whether it participates with other electric utilities in the selection of a common standard on an area or pool basis. The utility shall identify any such participating utilities, and provide a general explanation of the basis upon which the reliability standard was jointly developed.

(ii) The utility shall describe how its objective standard for production power supply reliability affects its electric generating facility construction planning and purchased power planning.

(iii) For the peak day of each month of Period II, Period I, and, to the extent data are available, for the peak day of each month of the three calendar years preceding Period I, the utility shall include tabular schedules designed to show the following:

(A) Net peak load in megawatts, itemized to show:

(*1*) Gross peak firm load, including all firm sales assured available by the reserve capacity of the utility;

(*2*) All firm purchases assured available by the reserve capacity of the supplier; and

(*3*) Net peak load, computed as gross peak load under clause (*1*) minus all firm purchases under clause (*2*).

(B) Net available dependable capacity, that is, the load-carrying ability of the electric production facilities determined for the purpose of scheduling capacity in day-to-day operations, provided in megawatts and itemized to show:

(*1*) The owned dependable capacity of the utility for each production plant category selected in Statement AD under paragraph (h)(4);

(*2*) Scheduled maintenance of owned dependable capacity of the utility;

(*3*) Purchased dependable capacity of the utility;

(*4*) Scheduled maintenance of purchased dependable capacity of the utility; and

(*5*) Net available dependable capacity, computed as the owned dependable capacity under clause (*1*), minus scheduled maintenance of owned capacity under clause (*2*), plus purchased dependable capacity under clause (*3*), minus scheduled maintenance of purchased capacity under clause (*4*).

(C) Available reserves in megawatts, which is the net available dependable capacity under clause (iii)(B) minus net peak load under clause (iii)(A).

(D) Available reserves as a percent of peak load, which is the available reserves under clause (iii)(C) divided by net peak load under clause (iii)(A).

(29) *Statement BD—Allocation energy and supporting data.* Statement BD is a statement of electric utility energy data for Period I and Period II to be considered as bases for allocating related costs to the wholesale services subject to the changed rate.

(i) For each month of Period I and Period II, and as totaled for the twelve months of each period, the utility shall show the megawatt-hours of firm power supply energy required by the system of the utility and the magawatt-hour energy requirements of the wholesale customer groups whose services will be subject to the changed rate. The wholesale service data for each individual customer delivery

point or set of delivery points that constitutes an individual wholesale customer billing unit shall include megawatt-hours at delivery. The utility shall summarize and subtotal these individual customer data in accordance with Statement BA customer groupings under paragraph (h)(26). The utility shall show a loss adjustment for each wholesale customer group to reflect energy at the power supply level. The utility shall total the data to show total customer group energy requirements at power supply level for each month of Period I and Period II.

(ii) Data provided under clause (i) shall not include energy associated with interruptible or curtailable services, or energy associated with other services, the revenues from which are shown as revenue credits in Statement AU under paragraph (h)(21) of this section. The utility shall separately state Period I and Period II monthly and total energy data for any such services provided by the utility. If any of the proposed wholesale rates at issue are for interruptible or curtailable service, the utility shall provide descriptive material and energy data specifically relevant to such services.

(iii) If a utility selects subfunctional categories in Statement AD under paragraph (h)(4) of this section for the purpose of supporting any changed wholesale rate for firm power supply services with special characteristics, such as base load, intermediate, and peaking services, the utility shall separate the energy data required by clause (i) into corresponding energy values consistent with the service characteristics and consistent with energy-related expense categories utilized in Statement AH under paragraph (h)(8) of this section. The utility shall state the corresponding values for the utility's system energy and for each applicable wholesale service group.

(iv) If a utility establishes plant categories in Statement AD under paragraph (h)(4) of this section for the purpose of supporting any changed wholesale rate for nonfirm production services, or the changed wholesale rate based on specialized ratemaking theories [see paragraph (h)(27)(v) of this section], the utility shall include in Statement BD all energy data relied on by the utility in developing the support on a cost of service basis and relevant explanatory material. Energy data provided under this clause shall be consistent with related expense categories utilized in Statement AH under paragraph (h)(8) of this section.

(v) For each month of Period I and Period II, and as totaled for the twelve months of each period, the utility shall show the megawatt-hours generated, itemized in accordance with Statement AD production subfunctional categories, and the megawatt-hours purchased or interchanged, itemized to show each type of transaction, such as firm energy or economy interchanged energy. The utility shall quantitatively reconcile such data with the system allocation energy reported in this statement, and with energy data underlying the fuel and purchased power expense reported in Statement AH.

(30) *Statement BE—Specific assignment data.* (i) Statement BE is a statement of specific components of the electric costs of service of the utility for Period I and Period II. Statement BE costs of service are those apportioned among wholesale services subject to the rate change and other utility services, on a basis other than:

(A) Demand, capability, or energy data provided in Statements BB and BD;

(B) A proportional relationship based on a selected plant category or expense item for which an allocation to wholesale services is to be independently determined; or

(C) Exclusive-use commitment in Statement BF under paragraph (h)(31) of this section.

(ii) The utility shall include specific assignments considered appropriate by the utility. Typical cost of service components that could be specifically assigned are distribution plant [*see* examples listed in Statement AD under paragraph (h)(4) of this section], certain total electric wages and salaries provided in Statement AI under paragraph (h)(9) of this section, such as wages and salaries for customer accounting and for customer service and

information, and certain administrative and general expense items. [*See* examples listed in Statement AH under paragraph (h)(8) of this section.]

(iii) The utility shall limit specific assignments to the minimum required to adequately provide for costs not otherwise appropriately allocable.

(iv) For each specific assignment, the utility shall include at least the following information:

(A) Brief descriptive component title, such as *distribution substations* or *rate case expenses*;

(B) Total electric amount in dollars;

(C) Wholesale customer group dollar amounts stated individually for each wholesale customer rate group identified in Statement BA under paragraph (h)(26), and stated in total for all such groups; and

(D) Explanation of the basis on which assignments were made, accompanied by supporting detailed computations.

(31) *Statement BF—Exclusive-use commitments of major power supply facilities.* Statement BF is a statement describing and justifying the commitment to exclusive-use for particular services of all or a stated portion of electric utility generation units or plants, or major transmission facilities.

(i) For Period I and Period II, the utility shall list each transaction in which all or a stated portion of the output of a specified filing utility-owned generating unit or group of units was committed exclusively to a particular customer or group of customers, or to a power pool or similar power supply entity. For each such transaction, the utility shall provide the following information:

(A) Brief descriptive title for each commitment;

(B) Name of plant and unit designation;

(C) Name of the purchaser or power pool or other similar power supply entity;

(D) Duration of the transaction;

(E) Basis of rates or charges, stated in terms of whether a transaction reflects marginal, incremental, or fully distributed costs, the specific overall and common equity rates of return included in costs, provided on both a claimed and earned basis to the extent such information is available, the approximate date of the cost analysis on which the rates and charges were based, and any other considerations significant to the transaction;

(F) Revenue received for each month of Period I and Period II or, if applicable, monthly quantities of power and energy received or available from power pools as consideration for commitment to a pool; and

(G) Proposed treatment in the cost of service determinations for the wholesale services at issue. For example, a credit of revenue to the total electric cost of service, in Statement AU under paragraph (h)(21), could be proposed to account for unit capacity sales based upon incremental capital costs. The utility shall include explanatory material and support for the proposed procedures.

(ii) For Period I and Period II, the utility shall list each transaction in which all, or a portion, of a major transmission facility owned by the filing utility was committed exclusively to a particular customer or group of customers. For each such transaction, the utility shall provide information similar to that required by clause (i).

(32) *Statement BG—Revenue data to reflect changed rates.* Statement BG is a statement of revenues for Period I and Period II, including those under the changed rate for the wholesale services at issue.

(i) For each month of Period I and Period II, and in total for each of the two periods, the utility shall show all billing determinants and metered quantities for each delivery point or set of delivery points that constitutes an individual wholesale customer billing unit, and the result of applying each specific rate component to the billing determinants for each billing unit stated with the total of the computed monthly bill for the customer. If the rates include a fuel clause, the utility shall compute and total the revenues under the fuel clause to reflect fuel costs incurred during each month of Period I and Period II. That is, the fuel clause revenues for the first month of Period I shall reflect fuel costs incurred for that month, and so on for each month of Period I and Period II. In computing fuel clause revenues, the

utility shall determine fuel cost according to § 35.14 of this chapter.

(ii) If the form of the proposed fuel clause would produce revenues different from those computed in accordance with clause (i), the utility shall separately compute and state such fuel clause revenues for each customer for each month of Period I and Period II.

(iii) The utility shall summarize separately revenue data computed in accordance with clauses (i) and (ii) above for each month and in total for Period I and Period II, in accordance with wholesale rate groups specified in Statement BA under paragraph (h)(26) of this section. The utility shall show total electric department revenues for each period to include revenues under the changed rate for all such wholesale customer rate groups.

(iv) For Period I and as estimated for Period II, the utility shall summarize all billing determinants and revenues received from interruptible or curtailable services. Billing determinants and revenue data shall be consistent with interruptible demand and energy data in Statements BB and BD. The utility shall include an explanation of the extent to which interruptible or curtailable service revenues are or are not included in revenue credits in Statement AU under paragraph (h)(21) of this section.

(33) *Statement BH—Revenue data to reflect present rates.* Statement BH is a statement of revenues for Period I and Period II, including those under present rates for wholesale services at issue, and for total electric service to reflect such revenues for wholesale services. The utility shall prepare this statement to include data consistent with criteria specified for presentation of revenue under the changed rate in Statement BG under paragraph (h)(32) of this section.

(34) *Statement BI—Fuel cost adjustment factors.* Statement BI is a statement of monthly fuel cost adjustment factors under the changed rate and under the present rates, for Period I and Period II.

(i) If the changed rate schedule embodies a fuel cost adjustment clause, the utility shall show detailed derivations of fuel cost adjustment factors computed to reflect fuel cost incurred during each month of Period I and Period II. Fuel cost adjustment factors are those required for revenue determinations in accordance with paragraph (h)(32)(i) of Statement BG.

(ii) If additional proposed fuel clause revenue data are reported in accordance with paragraph (h)(32)(ii) of Statement BG, the utility shall show detailed derivation of applicable monthly fuel adjustment factors.

(iii) If the present rate includes a fuel cost adjustment change, the utility shall show detailed derivations of fuel cost adjustment factors for each month of Period I and Period II. The utility shall include in Statement BI derivations for all monthly factors required in the computation of present fuel clause revenues reported in Statement BH. The utility shall provide an explanation of the differences between the present and proposed fuel clauses.

(iv) All fuel cost adjustment factors shall be cost-based. The utility shall make a computational showing that shall develop adjustment factors in a manner consistent with the requirements of § 35.14 of this chapter. The utility shall provide supporting detail on cost by type of fuel, and shall show separately the allowable fuel clause cost component of purchased or interchanged energy. All fuel cost data shall be consistent with that included in operation and maintenance expenses in Statement AH under paragraph (h)(8) of this section.

(35) *Statement BJ—Summary data tables.* Statement BJ is a tabular summary of portions of Period I and Period II data from specific cost of service statements in this paragraph. The utility shall summarize under descriptive titles the Period I and Period II data from the cost of service provisions listed in this subparagraph. The utility shall supply the data in the manner described for each cost of service statement and in this subparagraph.

(i) If a utility provides in Statement BK information that is substantially equivalent to the information required in this statement, the utility may fulfill the requirements of this statement by specifically referring to the location in Statement BK of the information required in this subparagraph.

(ii) The utility shall provide the information in the following statements as average total electric department monthly balances for each function and subfunction of plant:

(A) Statement AD—(h)(4)(i) and (ii);

(B) Statement AE—(h)(5)(i) and (ii);

(C) Statement AF—(h)(6)(i) through (v);

(D) Statement AG—(h)(7)(i) through (vi);

(E) Statement AL—(h)(12)(i) and (ii);

(F) Statement AM—(h)(13); and

(G) Statement AN—(h)(14).

(iii) The utility shall provide the information in the following statements as total electric department annual revenue and expense amounts:

(A) Statement AH—(h)(8)(i), (iv) and (v);

(B) Statement AI—(h)(9)(i) and (ii);

(C) Statement AJ—(h)(10)(i);

(D) Statement AK—(h)(11)(i);

(E) Statement AP—(h)(16)(i) through (iv);

(F) Statement AQ—(h)(17)(i) through (iii);

(G) Statement AR—(h)(18)(i) through (iv);

(H) Statement AS—(h)(19);

(I) Statement AT—(h)(20); and

(J) Statement AU—(h)(21).

(iv) The utility shall provide all cost of capital amounts in the following statements.

(A) Statement AV—(h)(22)(i)(A); and

(B) Statement AW—(h)(23);

(v) The utility shall provide all tax rate data in Statement AY, paragraph (h)(25)(i) of this section.

(vi) The utility shall provide the information in the following statements as appropriate, for total electric department values and individual customer group values:

(A) Statement BB—(h)(27)(i) through (vi);

(B) Statement BD—(h)(29)(i) through (iv);

(C) Statement BE—(h)(30)(iv) (A), (B), and (C);

(D) Statement BG—(h)(32)(iii); and

(E) Statement BH—(h)(33).

(36) *Statement BK—Electric utility department cost of service, total and as allocated.* Statement BK is a statement of the claimed fully allocated cost of service of the utility developed and shown for Period I and Period II. The utility shall include analytical support for each rate proposed to be differentiated on a time-of-use basis. The utility shall also provide any marginal or incremental cost information that is required to support the changed rate developed on a marginal or incremental cost basis. The utility shall show allocations of fully distributed costs to the wholesale services subject to the changed rate accompanied by a comparison of allocated costs with revenues under the changed rate. Nothing in this subparagraph shall preclude use by any utility of any cost of service technique it believes reasonable and that is consistent with the requirements of paragraph (g) of this section.

(i) The utility shall base the fully distributed cost of service and the allocations thereof upon data provided in the accompanying detailed statements required under this section and additional data which the utility may submit and support in connection with this statement. The cost of service data of the utility shall conform to the following requirements:

(A) The total electric rate base and cost of service shall be itemized and summarized by major functions and in a format designed to facilitate review and analysis.

(B) Based on the total electric rate base and cost of service, and on allocated or assigned component elements, the cost of service for each Statement BA wholesale customer rate group under paragraph (h)(26) shall be itemized and summarized by major functions in a format consistent with that shown for total electric.

(C) The costs of service data for total electric and for each of the wholesale customer groups shall include data that show the return and the income taxes by components and in total, based upon the rate of return claimed by the utility in Statement AV under paragraph (h)(22). Individual components of income taxes shall include income taxes payable, provision for deferred income tax—debits and deferred income tax—credits, investment tax credits, or other adjustments.

(D) The fully distributed cost of service study of the utility shall disclose the principal determinants for allocation of total electric costs among the

wholesale customer groups, including but not limited to the following:

(*1*) Computations showing the energy responsibilities of the wholesale services, with supporting detail;

(*2*) Computations showing the demand responsibilities of the wholesale services, with supporting detail; and

(*3*) Computations showing the specific assignment responsibilities of the wholesale services, with supporting detail.

(ii) For the total electric service and for each wholesale customer rate group, the utility shall compare the fully distributed cost of service with the revenues under the changed rate. Based on the comparison, the utility shall show the revenue excess or deficiency and the earned rate of return computed for the total electric service and for each wholesale customer rate group.

(iii) For any filing that contains Period II data, the utility shall supply any work papers and additional explanatory material necessary to support Statement BK, indexed, referenced and paginated as provided in paragraph (d)(5) of this section.

(iv) The utility shall provide a tabular comparison of Period II total electric fully distributed cost items with those of Period I. The comparisons shall show item amounts for each of the two periods, and also shall show Period II item amounts as percentages of equivalent items for Period I. Comparisons shall include at least the following items, accompanied by explanatory notes with respect to significant variations among the comparative percentages:

(A) Rate base;

(B) Production expenses;

(C) Transmission expenses;

(D) Customer accounting, customer service and information, and sales expenses;

(E) Depreciation expenses;

(F) Taxes except income and revenue;

(G) Income taxes;

(H) Revenue taxes; and

(I) Return claimed.

(37) *Statement BL—Rate design information.* In support of the design of the changed rate, the utility shall submit the following material:

(i) A narrative statement describing and justifying the objectives of the design of the changed rate. If the purpose of the rate design is to reflect costs, the utility shall state how that objective is achieved, and shall accompany it with a summary cost analysis that would justify the rate design, including any discounts or surcharges based on delivery voltage level or other specific considerations. Such summary cost analysis shall be consistent with, derived from, and cross-referenced to the data in cost of service Statement BK. If the rate design is not intended to reflect costs, whether fully distributed, marginal, incremental, or other, the utility shall provide a statement to justify the departure from cost-based rates.

(ii) If the billing determinants, such as quantities of demand, energy, or delivery points, are on different bases than the cost allocation determinants supporting such charges, the utility shall submit an explanation setting forth the economic or other considerations that warrant such departure. The information shall include at least the following:

(A) If the individual rate for the demand, energy and customer charges do not correspond to the comparable cost classifications supporting such charges, a detailed explanation stating the reasons for the differences.

(B) If the changed rate contains more than one demand or energy block, a detailed explanation indicating the rationale for the blocking and the considerations upon which such blocking is based, including adequate cost support for the specified blocking.

(38) *Statement BM—Construction program statement.* Statement BM is a summary of data and supporting assumptions relating to the economics of any construction program to replace or expand the utility's power supply that shall be filed if the utility is filing for construction work in progress in rate base under §35.26(c)(3) of this chapter. The filing utility shall describe generally its program for providing reliable and economic power for the period beginning with the date of the filing and ending with the tenth year after the test period. The statement shall include an assessment of the relative

costs of adopting alternative strategies including an analysis of alternative production plant, *e.g.*, cogeneration, small power production, heightened load management and conservation efforts, additions to transmission plant or increased purchases of power, and an explanation of why the program adopted is prudent and consistent with a least-cost energy supply program.

(Federal Power Act, 16 U.S.C. 791–828c; Dept. of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009, 42 FR 46267, 3 CFR 142 (1978); Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 91, 45 FR 46363, July 10, 1980, as amended at 47 FR 6826, Feb. 17, 1982; Order 225, 47 FR 19056, May 3, 1982; Order 298, 48 FR 24354, June 1, 1983; 51 FR 7782, Mar. 6, 1986; Order 475, 52 FR 24993, July 2, 1987; Order 545, 57 FR 53990, Nov. 16, 1992; Order 575, 60 FR 4854, Jan. 25, 1995]

Subpart C—Other Filing Requirements

§ 35.14 Fuel cost and purchased economic power adjustment clauses.

(a) Fuel adjustment clauses which are not in conformity with the principles set out below are not in the public interest. These regulations contemplate that the filing of proposed rate schedules which embody fuel clauses failing to conform to the following principles may result in suspension of those parts of such rate schedules:

(1) The fuel clause shall be of the form that provides for periodic adjustments per kWh of sales equal to the difference between the fuel and purchased economic power costs per kWh of sales in the base period and in the current period:

Adjustment Factor =*Fm/Sm-Fb/Sb*

Where: *F* is the expense of fossil and nuclear fuel and purchased economic power in the base (*b*) and current (*m*) periods; and S is the kWh sales in the base and current periods, all as defined below.

(2) Fuel and purchased economic power costs (*F*) shall be the cost of:

(i) Fossil and nuclear fuel consumed in the utility's own plants, and the utility's share of fossil and nuclear fuel consumed in jointly owned or leased plants.

(ii) The actual identifiable fossil and nuclear fuel costs associated with energy purchased for reasons other than identified in paragraph (a)(2)(iii) of this section.

(iii) The total cost of the purchase of economic power, as defined in paragraph (a)(11) of this section, if the reserve capacity of the buyer is adequate independent of all other purchases where non-fuel charges are included in either F_b or F_m;

(iv) Energy charges for any purchase if the total amount of energy charges incurred for the purchase is less than the buyer's total avoided variable cost;

(v) *And less* the cost of fossil and nuclear fuel recovered through all inter-system sales.

(3) Sales (S) must be all kWh's sold, excluding inter-system sales. Where for any reason, billed system sales cannot be coordinated with fuel costs for the billing period, sales may be equated to the sum of: (i) Generation, (ii) purchases, (iii) exchange received, less (iv) energy associated with pumped storage operations, less (v) inter-system sales referred to in paragraph (a)(2)(iv) of this section, less (vi) total system losses.

(4) The adjustment factor developed according to this procedure shall be modified to properly allow for losses (estimated if necessary) associated only with wholesale sales for resale.

(5) The adjustment factor developed according to this procedure may be further modified to allow the recovery of gross receipts and other similar revenue based tax charges occasioned by the fuel adjustment revenues.

(6) The cost of fossil fuel shall include no items other than those listed in Account 151 of the Commission's Uniform System of Accounts for Public Utilities and Licensees. The cost of nuclear fuel shall be that as shown in Account 518, except that if Account 518 also contains any expense for fossil fuel which has already been included in the cost of fossil fuel, it shall be deducted from this account. (Paragraph C of Account 518 includes the cost of other fuels used for ancillary steam facilities.)

(7) Where the cost of fuel includes fuel from company-owned or controlled[1] sources, that fact shall be noted and described as part of any filing. Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, and where the price of such fuel has been approved by that regulatory body, such costs shall be presumed, subject to rebuttal, to be reasonable and includable in the adjustment clause. If the current price, however, is in litigation and is being collected subject to refund, the utility shall so advise the Commission and shall keep a separate account of such amounts paid which are subject to refund, and shall advise the Commission of the final disposition of such matter by the regulatory body having jurisdiction. With respect to the price of fuel purchases from company-owned or controlled sources pursuant to contracts which are not subject to regulatory authority, the utility company shall file such contracts and amendments thereto with the Commission for its acceptance at the time it files its fuel clause or modification thereof. Any subsequent amendment to such contracts shall likewise be filed with the Commission as a rate schedule change and may be subject to suspension under section 205 of the Federal Power Act. Fuel charges by affiliated companies which do not appear to be reasonable may result in the suspension of the fuel adjustment clause or cause an investigation thereof to be made by the Commission on its own motion under section 206 of the Federal Power Act.

(8) All rate filings which contain a proposed new fuel clause or a change in an existing fuel clause shall conform such clauses with the regulations. Within one year of the effectiveness of this rulemaking, all public utilities with rate schedules that contain a fuel clause should conform such clauses with the regulations. Recognizing that individual public utilities may have special operating characteristics that may warrant granting temporary delays in the implementation of the regulations, the Commission may, upon showing of good cause, waive the requirements of this section of the regulations for an additional one-year period so as to permit the public utilities sufficient time to adjust to the requirements.

(9) All rate filings containing a proposed new fuel clause or change in an existing fuel clause shall include:

(i) A description of the fuel clause with detailed cost support for the base cost of fuel and purchased economic power or energy.

(ii) Full cost of service data unless the utility has had the rate approved by the Commission within a year, provided that such cost of service may not be required when an existing fuel cost adjustment clause is being modified to conform to the Commission's regulations.

(10) Whenever particular circumstances prevent the use of the standards provided for herein, or the use thereof would result in an undue burden, the Commission may, upon application under § 385.207 of this chapter and for good cause shown, permit deviation from these regulations.

(11) For the purpose of paragraph (a)(2)(iii) of this section, the following definitions apply:

(i) *Economic power* is power or energy purchased over a period of twelve months or less where the total cost of the purchase is less than the buyer's total avoided variable cost.

(ii) *Total cost of the purchase* is all charges incurred in buying economic power and having such power delivered to the buyer's system. The total cost includes, but is not limited to, capacity or reservation charges, energy charges, adders, and any transmission or wheeling charges associated with the purchase.

(iii) *Total avoided variable cost* is all identified and documented variable costs that would have been incurred by the buyer had a particular purchase not been made. Such costs include, but are not limited to, those associated with fuel, start-up, shut-down or any purchases that would have been made in lieu of the purchase made.

[1] As defined in the Commission's Uniform System of Accounts 18 CFR part 101, Definitions 5B.

(12) For the purpose of paragraph (a)(2)(iii) of this section, the following procedures and instructions apply:

(i) A utility proposing to include purchase charges other than those for fuel or energy in fuel and purchased economic power costs (*F)* under paragraph (a)(2)(iii) of this section shall amend its fuel cost adjustment clause so that it is consistent with paragraphs (a)(1) and (a)(2)(iii) of this section. Such amendment shall state the system reserve capacity criteria by which the system operator decides whether a reliability purchase is required. Where the utility filing the statement is required by a State or local regulatory body (including a plant site licensing board) to file a capacity criteria statement with that body, the system reserve capacity criteria in the statement filed with the Commission shall be identical to those contained in the statement filed with the State or local regulatory body. Any utility that changes its reserve capacity criteria shall, within 45 days of such change, file an amended fuel cost and purchased economic power adjustment clause to incorporate the new criteria.

(ii) Reserve capacity shall be deemed adequate if, at the time a purchase was initiated, the buyer's system reserve capacity criteria were projected to be satisfied for the duration of the purchase without the purchase at issue.

(iii) The total cost of the purchase must be projected to be less than total avoided variable cost, at the time a purchase was initiated, before any nonfuel purchase charge may be included in F_m.

(iv) The purchasing utility shall make a credit to F_m after a purchase terminates if the total cost of the purchase exceeds the total avoided variable cost. The amount of the credit shall be the difference between the total cost of the purchase and the total avoided variable cost. This credit shall be made in the first adjustment period after the end of the purchase. If a utility fails to make the credit in the first adjustment period after the end of the purchase, it shall, when making the credit, also include in F_m interest on the amount of the credit. Interest shall be calculated at the rate required by §35.19a(a)(2)(iii) of this chapter, and shall accrue from the date the credit should have been made under this paragraph until the date the credit is made.

(v) If a purchase is made of more capacity than is needed to satisfy the buyer's system reserve capacity criteria because the total costs of the extra capacity and associated energy are less than the buyer's total avoided variable costs for the duration of the purchase, the charges associated with the non-reliability portion of the purchase may be included in *F*.

(Approved by the Office of Management and Budget under control number 1902–0096)

(Federal Power Act, 16 U.S.C. 824d, 824e and 825h (1976 & Supp. IV 1980); Department of Energy Organization Act, 42 U.S.C. 7171, 7172 and 7173(c) (Supp. IV 1980); E.O. 12009, 3 CFR part 142 (1978); 5 U.S.C. 553 (1976))

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 421, 36 FR 3047, Feb. 17, 1971; 39 FR 40583, Nov. 19, 1974; Order 225, 47 FR 19056, May 3, 1982; Order 352, 48 FR 55436, Dec. 13, 1983; 49 FR 5073, Feb. 10, 1984; Order 529, 55 FR 47321, Nov. 13, 1990; Order 600, 63 FR 53809, Oct. 7, 1998]

§ 35.15 Notices of cancellation or termination.

(a) *General rule.* When a rate schedule or part thereof required to be on file with the Commission is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, each party required to file the schedule shall notify the Commission of the proposed cancellation or termination on the form indicated in §131.53 of this chapter at least sixty days but not more than one hundred-twenty days prior to the date such cancellation or termination is proposed to take effect. A copy of such notice to the Commission shall be duly posted. With such notice each filing party shall submit a statement giving the reasons for the proposed cancellation or termination, and a list of the affected purchasers to whom the notice has been mailed. For good cause shown, the Commission may by order provide that the notice of cancellation or termination shall be effective as of a date prior to the date of filing or prior to the date the filing would become effective in accordance with these rules.

(b) *Applicability.* (1) The provisions of paragraph (a) of this section shall apply to all contracts for unbundled transmission service and all power sale contracts:

(i) Executed prior to July 9, 1996; or

(ii) If unexecuted, filed with the Commission prior to July 9, 1996.

(2) Any power sales contract executed on or after July 9, 1996 that is to terminate by its own terms shall not be subject to the provisions of paragraph (a) of this section.

(c) *Notice.* Any public utility providing jurisdictional services under a power sales contract that is not subject to the provisions of paragraph (a) of this section shall notify the Commission of the date of the termination of such contract within 30 days after such termination takes place.

[Order 888, 61 FR 21692, May 10, 1996]

§ 35.16 Notice of succession.

Whenever the name of a public utility is changed, or its operating control is transferred to another public utility in whole or in part, or a receiver or trustee is appointed to operate any public utility, the exact name of the public utility, receiver, or trustee which will operate the property thereafter shall be filed within 30 days thereafter with the Commission on the form indicated in §131.51 of this chapter.

§ 35.17 Changes relating to suspended rate schedules or parts thereof.[4]

(a) *Withdrawal of suspended rate schedules or parts thereof.* Where a rate schedule or part thereof has been suspended by the Commission, it may be withdrawn during the period of suspension only by special permission of the Commission granted upon application therefor and for good cause shown. If permitted to be withdrawn, any such rate schedule may be refiled with the Commission within a one-year period thereafter only with special permission of the Commission for good cause shown.

(b) *Changes in suspended rate schedules or parts thereof.* A public utility may not, within the period of suspension, file any change in a rate schedule or part thereof which has been suspended by order of the Commission except by special permission of the Commission granted upon application therefor and for good cause shown.

(c) *Changes in rate schedules or parts thereof continued in effect and which were proposed to be changed by the suspended filing.* A public utility may not, within the period of suspension, file any change in a rate schedule or part thereof continued in effect by operation of an order of suspension and which was proposed to be changed by the suspended filing, except by special permission of the Commission granted upon application therefor and for good cause shown.

§ 35.18 Asset retirement obligations.

(a) A public utility that files a rate schedule under §35.12 or §35.13 and has recorded an asset retirement obligation on its books must provide a schedule, as part of the supporting work papers, identifying all cost components related to the asset retirement obligations that are included in the book balances of all accounts reflected in the cost of service computation supporting the proposed rates. However, all cost components related to asset retirement obligations that would impact the calculation of rate base, such as electric plant and related accumulated depreciation and accumulated deferred income taxes, may not be reflected in rates and must be removed from the rate base calculation through a single adjustment.

(b) A public utility seeking to recover nonrate base costs related to asset retirement costs in rates must provide, with its filing under §35.12 or §35.13, a detailed study supporting the amounts proposed to be collected in rates.

(c) A public utility that has recorded asset retirement obligations on its books, but is not seeking recovery of the asset retirement costs in rates, must remove all asset-retirement-obligations-related cost components from the cost of service supporting its proposed rates.

[Order 631, 68 FR 19619, Apr. 21, 2003]

[4] See General Policy and Interpretations, §2.4, of this chapter.

§ 35.19 Submission of information by reference.

If all or any portion of the information called for in this part has already been submitted to the Commission, substantially in the form prescribed above, specific reference thereto may be made in lieu of re-submission in response to the requirements of this part.

§ 35.19a Refund requirements under suspension orders.

(a) *Refunds.* (1) The public utility whose proposed increased rates or charges were suspended shall refund at such time in such amounts and in such manner as required by final order of the Commission the portion of any increased rates or charges found by the Commission in that suspension proceeding not to be justified, together with interest as required in paragraph (a)(2) of this section.

(2) Interest shall be computed from the date of collection until the date refunds are made as follows:

(i) At a rate of seven percent simple interest per annum on all excessive rates or charges held prior to October 10, 1974;

(ii) At a rate of nine percent simple interest per annum on all excessive rates or charges held between October 10, 1974, and September 30, 1979; and

(iii)(A) At an average prime rate for each calendar quarter on all excessive rates or charges held (including all interest applicable to such rates or charges) on or after October 1, 1979. The applicable average prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate values published in the *Federal Reserve Bulletin*, or in the Federal Reserve's ''Selected Interest Rates'' (Statistical Release G. 13), for the fourth, third, and second months preceeding the first month of the calendar quarter.

(B) The interest required to be paid under clause (iii)(A) shall be compounded quarterly.

(3) Any public utility required to make refunds pursuant to this section shall bear all costs of such refunding.

(b) *Reports.* Any public utility whose proposed increased rates or charges were suspended and have gone into effect pending final order of the Commission pursuant to section 205(e) of the Federal Power Act shall keep accurate account of all amounts received under the increased rates or charges which became effective after the suspension period, for each billing period, specifiying by whom and in whose behalf such amounts are paid.

[44 FR 53503, Sept. 14, 1979, as amended at 45 FR 3889, Jan. 21, 1980; Order 545, 57 FR 53990, Nov. 16, 1992]

§ 35.21 Applicability to licensees and others subject to section 19 or 20 of the Federal Power Act.

Upon further order of this Commission issued upon its own motion or upon complaint or request by any person or State within the meaning of sections 19 or 20 of the Federal Power Act, the provisions of §§ 35.1 through 35.19 shall be operative as to any licensee or others who are subject to this Commission's jurisdiction in respect to services and the rates and charges of payment therefor by reason of the requirements of sections 19 or 20 of the Federal Power Act. The requirement of this section for compliance with the provisions of §§ 35.1 through 35.19 shall be in addition to and independent of any obligation for compliance with those regulations by reason of the provisions of sections 205 and 206 of the Federal Power Act. For purposes of applying this section *Electric Service* as otherwise defined in § 35.2(a) shall mean: Services to customers or consumers of power within the meaning of sections 19 or 20 of the Federal Power Act which may be comprised of various classes of capacity and energy and/or transmission services subject to the jurisdiction of this Commission. *Electric Service* shall include the utilization of facilities owned or operated by any licensee or others to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein *Electric Service* is without regard to the form of payment or compensation for the sales or services rendered, whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise. For purposes of applying this

section, *Rate Schedule* as otherwise defined in §35.2(b) shall mean: A statement of

(1) Electric service as defined in this §35.21,

(2) Rates and charges for or in connection with that service, and

(3) All classifications, practices, rules, regulations, or contracts which in any manner affect or relate to the aforementioned service, rates and charges. This statement shall be in writing and may take the physical form of a contractual document, purchase or sale agreement, lease of facilities, tariff[5] or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof.

§ 35.22 Limits for percentage adders in rates for transmission services; revision of rate schedules.

(a) *Applicability*. This section applies to all electric rate schedules required to be filed under this part that are used for transactions in which the utility or system performs a transmission or purchase and resale function.

(b) *Definition*. For purposes of this section, *purchased power price* means the amount paid by a utility or system that performs a transmission or purchase and resale function for electric power generated by another utility or system.

(c) *General rule*. (1) If a utility or system uses a rate component that recovers revenues computed wholly or in part as a percentage of the purchased power price, the utility or system shall establish a limit on the revenues recovered by such rate component in any transaction, in accordance with paragraph (d) of this section.

(2) The limit established under this paragraph shall be stated in mills per kilowatt-hour.

(d) *Cost support information*. (1) A utility or system shall submit cost support information to justify any revenue limit established under paragraph (c) of this section, except as provided in paragraph (e) of this section.

(2) The information submitted under this section shall consist of those costs, other than the purchased power price, incurred by a utility or system as a result of a transmission or purchase and resale transaction, which costs are not recovered under any other rate component.

(e) *Exception*. A utility or system need not submit the cost support information required under paragraph (d) of this section if the limit established under paragraph (c) of this section is not more than one mill per kilowatt-hour.

(f) *Revision of rate schedules*. Every utility or system shall:

(1) Amend any rate schedule or tariff to indicate any limit established pursuant to this section, not later than 60 days after the effective date of this rule; and

(2) Hereafter conform any rate or rate change filed under this part to the requirements of this section.

(Federal Power Act, as amended, 16 U.S.C. 792–828c; Department of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009, 3 CFR 142 (1978))

[Order 84, 45 FR 31300, May 13, 1980. Redesignated by Order 545, 57 FR 53990, Nov. 16, 1992]

§ 35.23 General provisions.

(a) *Applicability*. This subpart applies to any wholesale sale of electric energy in a coordination transaction by a public utility if that sale requires the use of an emissions allowance.

(b) *Implementation Procedures*. (1) If a public utility has a coordination rate schedule on file that expressly provides for the recovery of all incremental or out-of-pocket costs, such utility may make an abbreviated rate filing detailing how it will recover emissions allowance costs. Such filing must include the following: the index or combination of indices to be used; the method by which the emission allowance amounts will be calculated; timing procedures; how inconsistencies, if any, with dispatch criteria will be reconciled; and how any other rate impacts will be addressed. In addition, a utility making an abbreviated filing must:

(i) Clearly identify the filing as being limited to an amendment to a coordination rate to reflect the cost of emissions allowances, in the first paragraph of the letter of transmittal accompanying the filing;

[5] See footnote 1 to §35.2.

(ii) Submit revised pages that can be inserted into each rate schedule; and

(iii) Identify each rate schedule to which the amendment applies.

(2) The abbreviated filing must apply consistent treatment to all coordination rate schedules. If the filing does not apply consistent rate treatment, the public utility must explain why it does not do so.

(3) If a public utility wants to charge incremental costs for emissions allowances, but its rate schedule on file with the Commission does not provide for the recovery of all incremental costs, the selling public utility may submit an abbreviated filing if all customers agree to the rate change. If customers do not agree, the selling public utility must tender its emissions allowance proposal in a separate section 205 rate filing, fully justifying its proposal.

[59 FR 65938, Dec. 22, 1994]

§ 35.24 Tax normalization for public utilities.

(a) *Applicability*. (1) Except as provided in subparagraph (2) of this paragraph, this section applies, with respect to rate schedules filed under §§ 35.12 and 35.13 of this part, to the ratemaking treatment of the tax effects of all transactions for which there are timing differences.

(2) This section does not apply to the following timing differences:

(i) Differences that result from the use of accelerated depreciation;

(ii) Differences that result from the use of Class Life Asset Depreciation Range (ADR) provisions of the Internal Revenue Code;

(iii) Differences that result from the use of accelerated amortization provisions on certified defense and pollution control facilities;

(iv) Differences that arise from recognition of extraordinary property losses as a current expense for tax purposes but as a deferred and amortized expense for book purposes;

(v) Differences that arise from recognition of research, development, and demonstration expenditures as a current expense for tax purposes but as a deferred and amortized expense for book purposes;

(vi) Differences that result from different tax and book reporting of deferred gains or losses from disposition of utility plant;

(vii) Differences that result from the use of the Asset Guideline Class ''Repair Allowance'' provision of the Internal Revenue Code;

(viii) Differences that result from recognition of purchased gas costs as a current expense for tax purposes but as a deferred expense for book purposes.

(*See* Order 13, issued October 18, 1978; Order 203, issued May 29, 1958; Order 204, issued May 29, 1958; Order 404, issued May 15, 1970; Order 408, issued August 26, 1970; Order 432, issued April 23, 1971; Order 504, issued February 11, 1974; Order 505, issued February 11, 1974; Order 566, issued June 3, 1977; Opinion 578, issued June 3, 1970; and Opinion 801, issued May 31, 1977.)

(b) *General rules*—1) *Tax normalization required*. (i) A public utility must compute the income tax component of its cost of service by using tax normalization for all transactions to which this section applies.

(ii) Except as provided in paragraph (c) of this section, application of tax normalization by a public utility under this section to compute the income tax component will not be subject to case-by-case adjudication.

(2) *Reduction of, and addition to, rate base*. (i) The rate base of a public utility using tax normalization under this section must be reduced by the balances that are properly recordable in Account 281, ''Accumulated deferred income taxes-accelerated amortization property;'' Account 282, ''Accumulated deferred income taxes—other property;'' and Account 283, ''Accumulated deferred income taxes—other.'' Balances that are properly recordable in Account 190, ''Accumulated deferred income taxes,'' must be treated as an addition to rate base.

(ii) Such rate base reductions or additions must be limited to deferred taxes related to rate base, construction or other jurisdictional activities.

(iii) If a public utility uses an approved purchased gas adjustment clause or a research, development and demonstration tracking clause, the rate base reductions or additions required under this subparagraph must apply only to the extent that the balances in Account 190 and Accounts 281 through 283 are not used, for purposes

of calculating carrying charges, as an offset to balances properly recordable in Account 188, ''Research development and demonstration expenditures,'' or Account 191, ''Unrecovered purchased gas costs.''

(c) *Special rules.* (1) This paragraph applies:

(i) If the public utility has not provided deferred taxes in the same amount that would have accrued had tax normalization been applied for the tax effects of timing difference transactions originating at any time prior to the test period; or

(ii) If, as a result of changes in tax rates, the accumulated provision for deferred taxes becomes deficient in or in excess of amounts necessary to meet future tax liabilities as determined by application of the current tax rate to all timing difference transactions originating in the test period and prior to the test period.

(2) The public utility must compute the income tax component in its cost of service by making provision for any excess or deficiency in deferred taxes described in subparagraphs (1)(i) or (1)(ii) of this paragraph.

(3) The public utility must apply a Commission-approved ratemaking method made specifically applicable to the public utility for determining the cost of service provision described in subparagraph (2) of this paragraph. If no Commission-approved ratemaking method has been made specifically applicable to the public utility, then the public utility must use some ratemaking method for making such provision, and the appropriateness of this method will be subject to case-by-case determination.

(d) *Definitions.* For purposes of this section, the term:

(1) *Tax normalization* means computing the income tax component as if the amounts of timing difference transactions recognized in each period for ratemaking purposes were also recognized in the same amount in each such period for income tax purposes.

(2) *Timing differences* means differences between amounts of expenses or revenues recognized for income tax purposes and amounts of expenses or revenues recognized for ratemaking purposes, which differences arise in one time period and reverse in one or more other time periods so that the total amounts of expenses or revenues recognized for income tax purposes and for ratemaking purposes are equal.

(3) *Commission-approved ratemaking method* means a ratemaking method approved by the Commission in a final decision including approval of a settlement agreement containing a ratemaking method only if such settlement agreement applies that method beyond the effective term of the settlement agreement.

(4) *Income tax purposes* means for the purpose of computing income tax under the provisions of the Internal Revenue Code or the income tax provisions of the laws of a State or political subdivision of a State (including franchise taxes).

(5) *Income tax component* means that part of the cost of service that covers income tax expenses allowable by the Commission.

(6) *Ratemaking purposes* means for the purpose of fixing, modifying, approving, disapproving or rejecting rates under the Federal Power Act or the Natural Gas Act.

(7) *Tax effect* means the tax reduction or addition associated with a specific expense or revenue transaction.

(8) *Transaction* means an activity or event that gives rise to an accounting entry that is used in determining revenues or expenses.

[46 FR 26636, May 14, 1981. Redesignated and amended by Order 144–A, 47 FR 8342, Feb. 26, 1982; Redesignated by Order 545, 57 FR 53990, Nov. 16, 1992]

§ 35.25 Construction work in progress.

(a) *Applicability.* This section applies to any rate schedule filed under this part by any public utility as defined in subsection 201(e) of the Federal Power Act.

(b) *Definitions.* For purposes of this section:

(1) *Constuction work in progress* or *CWIP* means any expenditure for public utility plant in process of construction that is properly included in Accounts 107 (construction work in progress) and 120.1 (nuclear fuel in process of refinement, conversion, enrichment, and fabrication) of part 101 of this chapter, the

Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act (Major and Nonmajor), that would otherwise be eligible for allowance for funds used during construction (AFUDC) treatment.

(2) *Double whammy* means a situation which may arise when a wholesale electric rate customer embarks upon its own or participates in a construction program to supply itself with all or a portion of its future power needs, thereby reducing its future dependence on the CWIP of the rate applicant, but is simultaneously forced to pay to the CWIP public utility rate applicant the CWIP portion of the wholesale rates that reflects existing levels of service or a different anticipated service level.

(3) *Fuel conversion facility* means any addition to public utility plant that enables a natural gas-burning plant to convert to the use of other fuels, or that enables an oil-burning plant to convert to the use of other fuels, other than natural gas. Such facilities include those that alter internal plant workings, such as oil or coal burners, soot blowers, bottom ash removal systems and concomitant air pollution control facilities, and any facility needed for receiving and storing the fuel to which the plant is being converted, which facility would not be necessary if the plant continued to burn gas or oil.

(4) *Pollution control facility* means an identifiable structure or portions of a structure that is designed to reduce the amount of pollution produced by the power plant, but does not include any facility that reduces pollution by substituting a different method of generation or that generates the additional power necessitated by the operation of a pollution control facility.

(c) *General rule.* For purposes of any initial rate schedule or any rate schedule change filed under §35.12 or §35.13 of this part, a public utility may include in its rate base any costs of construction work in progress (CWIP), including allowance for funds used during construction (AFUDC), as provided in this section.

(1) *Pollution control facilities*—(i) *General rule.* Any CWIP for pollution control facilities allocable to electric power sales for resale may be included in the rate base of the public utility.

(ii) *Qualification as a pollution control facility.* In determining whether a facility is a pollution control facility for purposes of this section, the Commission will consider:

(A) Whether such facility is the type facility described in the Internal Revenue Service laws, 26 U.S.C. 169(d)(1), as follows:

> ''A new identifiable treatment facility which is used * * * to abate or control water or atmospheric pollution or contamination by removing, altering, disposing, storing, or preventing the creation or emission of pollutants, contaminants, wastes or heat'';

(B) Whether such facility has been certified by a local, state, or federal agency as being in conformity with, or required by, a program of pollution control;

(C) Other evidence showing that such facilities are for pollution control.

(2) *Fuel conversion facilities.* Any CWIP for fuel conversion facilities allocable to electric power sales for resale may be included in the rate base of the public utility.

(3) *Non-pollution control of fuel conversion (non-PC/FC) CWIP.* No more than 50 percent of any CWIP allocable to electric power sales for resale not otherwise included in rate base under paragraphs (c) (1) and (2) of this section, may be included in the rate base of the public utility.

(4) *Forward looking allocation ratios.* Every test period CWIP project requested for wholesale rate base treatment pursuant to §35.26(c)(1), (2), and (3) of this part will be allocated to the customer classes on the basis of forward looking allocation ratios reflecting the anticipated average annual use the wholesale customers will make of the system over the estimated service life of the project. Supporting documentation, as required by §§35.12 and 35.13 of this part, must be in sufficient detail to permit examination and verification of the forward looking allocation ratio's recognition of each wholesale customer's plans, if any, for future alternative or supplementary power supplies. For the purpose of preventing anticompetitive effects, including CWIP-induced price squeeze

and double whammy, sufficient recognition of such plans may require the public utility applicant to provide for separate customer groups or provide for a rate design incorporating selected CWIP project credits.

(d) *Effective date.* If a public utility proposes in its filed rates to include CWIP in rate base under this section, that portion of the rate related to CWIP is collectable at the time the general rates become effective pursuant to Commission order, whether or not subject to refund, except as provided in paragraph (g) of this section.

(e) *Discontinuance of AFUDC.* On the date that any proposed rate that includes CWIP in rate base becomes effective, a public utility that has included CWIP in rate base must discontinue the capitalization of any AFUDC related to those amounts of CWIP is rate base.

(f) *Accounting procedures.* When a public utility files to include CWIP in its rate base pursuant to this section, it must propose accounting procedures in that rate schedule filing that:

(1) Ensure that wholesale customers will not be charged for both capitalized AFUDC and corresponding amounts of CWIP proposed to be included in rate base; and

(2) Ensure that wholesale customers will not be charged for any corresponding AFUDC capitalized as a result of different accounting or ratemaking treatments accorded CWIP by state or local regulatory authorities.

(g) *Anticompetitive procedures*—(1) *Filing requirements.* In order to facilitate Commission review of the anticompetitive effects of applications for CWIP pursuant to §35.26(c)(3), a public utility applying for rates based upon inclusion of such CWIP in rate base must include the following information in its filing:

(i) The percentage of the proposed increase in the jurisdictional rate level attributable to non-pollution control/fuel conversion CWIP and the percentage of non-pollution control/fuel conversion CWIP supporting the proposed rate level;

(ii) The percentage of non-pollution control/fuel conversion CWIP permitted by the state or local commission supporting the current retail rates of the public utility against which the relevant wholesale customers compete; and

(iii) Individual earned rate of return analyses of each of the competing retail rates developed on a basis fully consistent with the wholesale cost of service for the same test period if the requested percentage of wholesale non-pollution control/fuel conversion CWIP exceeds that permitted by the relevant state or local authority to support the currently competing retail rates.

(2) *Preliminary relief.* (i) If an intervenor in its initial pleading alleges that a price squeeze will occur as a direct result of the public utility's request for CWIP pursuant to §35.26(c)(3), makes a showing that it is likely to incur harm if such CWIP is allowed subject to refund, and makes a showing of how the harm to the intervenor would be mitigated or eliminated by the types of preliminary relief requested, the Commission will consider preliminary relief at the suspension stage of the case pursuant to paragraph (g)(4) of this section. In determining whether to grant preliminary relief, the Commission will balance the following public interest considerations:

(A) The harm to the intervenor if it is not granted preliminary relief from the requested CWIP;

(B) The harm to the public utility if, during the interim period of preliminary relief, the public utility is required to recover its financing charges later through AFUDC rather than immediately through CWIP; and

(C) Mitigating bias against investment in new plants, ensuring accurate price signals, and fostering rate stability.

(ii) Whether or not preliminary relief is granted at the suspension stage will not preclude consideration of further interim or final remedies later in the preceedings, if warranted.

(3) If the Commission makes a final determinaion that a price squeeze due solely to allowance of a lower percentage of non-pollution control/fuel conversion CWIP in the public utility's retail rate base than allowed by this Commission, the Commission will consider an adjustment to non-pollution control/fuel conversion CWIP in order to eliminate or mitigate the price squeeze.

(4) If an intervenor meets the requirements of paragraph (g)(2) of this section, the Commission, depending on the type of showing made including the likelihood, immediacy, and severity of any anticompetitive harm, may:

(i) Suspend the entire rate increase or all or a portion of the non-pollution control/fuel conversion CWIP component for up to five months;

(ii) Allow all or a portion of the non-pollution control/fuel conversion CWIP only prospectively from the issuance of the Commission's final order on rehearing on the matter; or

(iii) Take such other action as is proper under the circumstances.

[Order 474, 52 FR 23965, June 26, 1987, as amended by Order 474–A, 52 FR 35702, Sept. 23, 1987; Order 474–B, 54 FR 32804, Aug. 10, 1989. Redesignated by Order 545, 57 FR 53990, Nov. 16, 1992, as amended by Order 626, 67 FR 36096, May 23, 2002]

§ 35.26 Recovery of stranded costs by public utilities and transmitting utilities.

(a) *Purpose*. This section establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs.

(b) *Definitions*—1) *Wholesale stranded cost* means any legitimate, prudent and verifiable cost incurred by a public utility or a transmitting utility to provide service to:

(i) A wholesale requirements customer that subsequently becomes, in whole or in part, an unbundled wholesale transmission services customer of such public utility or transmitting utility; or

(ii) A retail customer that subsequently becomes, either directly or through another wholesale transmission purchaser, an unbundled wholesale transmission services customer of such public utility or transmitting utility.

(2) *Wholesale requirements customer* means a customer for whom a public utility or transmitting utility provides by contract any portion of its bundled wholesale power requirements.

(3) *Wholesale transmission services* means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce or ordered pursuant to section 211 of the Federal Power Act (FPA).

(4) *Wholesale requirements contract* means a contract under which a public utility or transmitting utility provides any portion of a customer's bundled wholesale power requirements.

(5) *Retail stranded cost* means any legitimate, prudent and verifiable cost incurred by a public utility to provide service to a retail customer that subsequently becomes, in whole or in part, an unbundled retail transmission services customer of that public utility.

(6) *Retail transmission services* means the transmission of electric energy sold, or to be sold, in interstate commerce directly to a retail customer.

(7) *New wholesale requirements contract* means any *wholesale requirements* contract executed after July 11, 1994, or extended or renegotiated to be effective after July 11, 1994.

(8) *Existing wholesale requirements* contract means any *wholesale requirements* contract executed on or before July 11, 1994.

(c) *Recovery of wholesale stranded costs*—1) *General requirement*. A public utility or transmitting utility will be allowed to seek recovery of wholesale stranded costs only as follows:

(i) No public utility or transmitting utility may seek recovery of wholesale stranded costs if such recovery is explicitly prohibited by a contract or settlement agreement, or by any power sales or transmission rate schedule or tariff.

(ii) No public utility or transmitting utility may seek recovery of stranded costs associated with a new wholesale requirements contract if such contract does not contain an exit fee or other explicit stranded cost provision.

(iii) If wholesale stranded costs are associated with a new wholesale requirements contract containing an exit fee or other explicit stranded cost provision, and the seller under the contract is a public utility, the public utility may seek recovery of such costs, in accordance with the contract, through rates for electric energy under sections 205–206 of the FPA. The public utility may not seek recovery of such costs through any transmission rate for FPA section 205 or 211 transmission services.

(iv) If wholesale stranded costs are associated with a new wholesale requirements contract, and the seller under the contract is a transmitting utility but not also a public utility, the transmitting utility may not seek an order from the Commission allowing recovery of such costs.

(v) If wholesale stranded costs are associated with an existing wholesale requirements contract, if the seller under such contract is a public utility, and if the contract does not contain an exit fee or other explicit stranded cost provision, the public utility may seek recovery of stranded costs only as follows:

(A) If either party to the contract seeks a stranded cost amendment pursuant to a section 205 or section 206 filing under the FPA made prior to the expiration of the contract, and the Commission accepts or approves an amendment permitting recovery of stranded costs, the public utility may seek recovery of such costs through FPA section 205–206 rates for electric energy.

(B) If the contract is not amended to permit recovery of stranded costs as described in paragraph (c)(1)(v)(A) of this section, the public utility may file a proposal, prior to the expiration of the contract, to recover stranded costs through FPA section 205–206 or section 211–212 rates for wholesale transmission services to the customer.

(vi) If wholesale stranded costs are associated with an existing wholesale requirements contract, if the seller under such contract is a transmitting utility but not also a public utility, and if the contract does not contain an exit fee or other explicit stranded cost provision, the transmitting utility may seek recovery of stranded costs through FPA section 211–212 transmission rates.

(vii) If a retail customer becomes a legitimate wholesale transmission customer of a public utility or transmitting utility, *e.g.*, through municipalization, and costs are stranded as a result of the retail-turned-wholesale customer's access to wholesale transmission, the utility may seek recovery of such costs through FPA section 205–206 or section 211–212 rates for wholesale transmission services to that customer.

(2) *Evidentiary demonstration for wholesale stranded cost recovery*. A public utility or transmitting utility seeking to recover wholesale stranded costs in accordance with paragraphs (c)(1) (v) through (vii) of this section must demonstrate that:

(i) It incurred costs to provide service to a wholesale requirements customer or retail customer based on a reasonable expectation that the utility would continue to serve the customer;

(ii) The stranded costs are not more than the customer would have contributed to the utility had the customer remained a wholesale requirements customer of the utility, or, in the case of a retail-turned-wholesale customer, had the customer remained a retail customer of the utility; and

(iii) The stranded costs are derived using the following formula: Stranded Cost Obligation = (Revenue Stream Estimate—Competitive Market Value Estimate) × Length of Obligation (reasonable expectation period).

(3) *Rebuttable presumption*. If a public utility or transmitting utility seeks recovery of wholesale stranded costs associated with an existing wholesale requirements contract, as permitted in paragraph (c)(1) of this section, and the existing wholesale requirements contract contains a notice provision, there will be a rebuttable presumption that the utility had no reasonable expectation of continuing to serve the customer beyond the term of the notice provision.

(4) *Procedure for customer to obtain stranded cost estimate*. A customer under an existing wholesale requirements contract with a public utility seller may obtain from the seller an estimate of the customer's stranded cost obligation if it were to leave the public utility's generation supply system by filing with the public utility a request for an estimate at any time prior to the termination date specified in its contract.

(i) The public utility must provide a response within 30 days of receiving the request. The response must include:

(A) An estimate of the customer's stranded cost obligation based on the

formula in paragraph (c)(2)(iii) of this section;

(B) Supporting detail indicating how each element in the formula was derived;

(C) A detailed rationale justifying the basis for the utility's reasonable expectation of continuing to serve the customer beyond the termination date in the contract;

(D) An estimate of the amount of released capacity and associated energy that would result from the customer's departure; and

(E) The utility's proposal for any contract amendment needed to implement the customer's payment of stranded costs.

(ii) If the customer disagrees with the utility's response, it must respond to the utility within 30 days explaining why it disagrees. If the parties cannot work out a mutually agreeable resolution, they may exercise their rights to Commission resolution under the FPA.

(5) A customer must be given the option to market or broker a portion or all of the capacity and energy associated with any stranded costs claimed by the public utility.

(i) To exercise the option, the customer must so notify the utility in writing no later than 30 days after the public utility files its estimate of stranded costs for the customer with the Commission.

(A) Before marketing or brokering can begin, the utility and customer must execute an agreement identifying, at a minimum, the amount and the price of capacity and associated energy the customer is entitled to schedule, and the duration of the customer's marketing or brokering of such capacity and energy.

(ii) If agreement over marketing or brokering cannot be reached, and the parties seek Commission resolution of disputed issues, upon issuance of a Commission order resolving the disputed issues, the customer may reevaluate its decision in paragraph (c)(5)(i) of this section to exercise the marketing or brokering option. The customer must notify the utility in writing within 30 days of issuance of the Commission's order resolving the disputed issues whether the customer will market or broker a portion or all of the capacity and energy associated with stranded costs allowed by the Commission.

(iii) If a customer undertakes the brokering option, and the customer's brokering efforts fail to produce a buyer within 60 days of the date of the brokering agreement entered into between the customer and the utility, the customer shall relinquish all rights to broker the released capacity and associated energy and will pay stranded costs as determined by the formula in paragraph (c)(2)(iii) of this section.

(d) *Recovery of retail stranded costs*—1) *General requirement.* A public utility may seek to recover retail stranded costs through rates for retail transmission services only if the state regulatory authority does not have authority under state law to address stranded costs at the time the retail wheeling is required.

(2) *Evidentiary demonstration necessary for retail stranded cost recovery.* A public utility seeking to recover retail stranded costs in accordance with paragraph (d)(1) of this section must demonstrate that:

(i) It incurred costs to provide service to a retail customer that obtains retail wheeling based on a reasonable expectation that the utility would continue to serve the customer; and

(ii) The stranded costs are not more than the customer would have contributed to the utility had the customer remained a retail customer of the utility.

[Order 888–A, 62 FR 12460, Mar. 14, 1997]

§ 35.27 Power sales at market-based rates.

(a) Notwithstanding any other requirements, any public utility seeking authorization to engage in sales for resale of electric energy at market-based rates shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity for which construction has commenced on or after July 9, 1996.

(b) Nothing in this part—

(1) Shall be construed as preempting or affecting any jurisdiction a state commission or other state authority may have under applicable state and federal law, or

(2) Limits the authority of a state commission in accordance with state and federal law to establish

(i) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or

(ii) Non-discriminatory fees for the distribution of such electric energy to retail consumers for purposes established in accordance with state law.

(c) *Reporting requirement.* Any public utility with the authority to engage in sales for resale of electric energy in interstate commerce at market-based rates shall be subject to the following:

(1) As a condition of obtaining and retaining market-based rate authority, a public utility with market-based rate authority must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following:

(i) Ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or

(ii) Affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area.

(2) Any change in status subject to paragraph (c)(1) of this section must be filed no later than 30 days after the change in status occurs.

[Order 888, 61 FR 21693, May 10, 1996, as amended by Order 652, 70 FR 8269, Feb. 18, 2005]

§ 35.28 Non-discriminatory open access transmission tariff.

(a) *Applicability.* This section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce and to any non-public utility that seeks voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

(b) *Definitions*—(1) *Requirements service agreement* means a contract or rate schedule under which a public utility provides any portion of a customer's bundled wholesale power requirements.

(2) *Economy energy coordination agreement* means a contract, or service schedule thereunder, that provides for trading of electric energy on an ''if, as and when available'' basis, but does not require either the seller or the buyer to engage in a particular transaction.

(3) *Non-economy energy coordination agreement* means any non-requirements service agreement, except an economy energy coordination agreement as defined in paragraph (b)(2) of this section.

(c) *Non-discriminatory open access transmission tariffs*—(1) Every public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce must have on file with the Commission a tariff of general applicability for transmission services, including ancillary services, over such facilities. Such tariff must be the open access pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶31,036 (Final Rule on Open Access and Stranded Costs) or such other open access tariff as may be approved by the Commission consistent with Order No. 888, FERC Stats. & Regs. ¶31,036.

(i) Subject to the exceptions in paragraphs (c)(1)(ii), (c)(1)(iii), and (c)(1)(iv) of this section, the pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶31,036, and accompanying rates, must be filed no later than 60 days prior to the date on which a public utility would engage in a sale of electric energy at wholesale in interstate commerce or in the transmission of electric energy in interstate commerce.

(ii) If a public utility owns, controls or operates facilities used for the transmission of electric energy in interstate commerce as of July 9, 1996, it must file the pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶31,036, pursuant to section 206 of the FPA and accompanying rates pursuant to section 205 of the FPA, no later than July 9, 1996. However, if a public utility has already filed, or has on file, an open access tariff and accompanying rates as of April 24, 1996, it may, but is not required to, file new rates with its section 206 pro forma tariff filing.

(iii) If a public utility owns, controls or operates transmission facilities used for the transmission of electric energy in interstate commerce as of July 9, 1996, such facilities are jointly owned with a non-public utility, and the joint ownership contract prohibits transmission service over the facilities to third parties, the public utility with respect to access over the public utility's share of the jointly owned facilities must file no later than December 31, 1996 the pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶31,036, pursuant to section 206 of the FPA and accompanying rates pursuant to section 205 of the FPA.

(iv) If a public utility obtains a waiver of the tariff requirement pursuant to paragraph (d) of this section, it does not need to file the pro forma tariff required by this section.

(v) Any public utility that seeks a deviation from the pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶31,036, must demonstrate that the deviation is consistent with the principles of Order No. 888, FERC Stats. & Regs. ¶31,036.

(2) Every public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce, and that uses those facilities to engage in wholesale sales and/or purchases of electric energy, or unbundled retail sales of electric energy, must take transmission service for such sales and/or purchases under the open access tariff filed pursuant to this section.

(i) Subject to the exceptions in paragraphs (c)(2)(ii) and (c)(3)(iv) of this section, this requirement is effective on the date that such public utility engages in a wholesale sale or purchase of electric energy or any unbundled retail sale of electric energy, but no earlier than July 9, 1996.

(ii) For sales of electric energy pursuant to a requirements service agreement executed on or before July 9, 1996, this requirement will not apply unless separately ordered by the Commission. For sales of electric energy pursuant to a bilateral economy energy coordination agreement executed on or before July 9, 1996, this requirement is effective on December 31, 1996. For sales of electric energy pursuant to a bilateral non-economy energy coordination agreement executed on or before July 9, 1996, this requirement will not apply unless separately ordered by the Commission.

(3) Every public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce, and that is a member of a power pool, public utility holding company, or other multi-lateral trading arrangement or agreement that contains transmission rates, terms or conditions, must file a joint pool-wide or system-wide open access transmission pro forma tariff.

(i) For any power pool, public utility holding company or other multi-lateral arrangement or agreement that contains transmission rates, terms or conditions and that is executed after July 9, 1996, this requirement is effective on the date that transactions begin under the arrangement or agreement.

(ii) For any public utility holding company arrangement or agreement that contains transmission rates, terms or conditions and that is executed on or before July 9, 1996, this requirement is effective July 9, 1996, except for the Central and South West System, which must comply no later than December 31, 1996.

(iii) For any power pool or multi-lateral arrangement or agreement other than a public utility holding company arrangement or agreement, that contains transmission rates, terms or conditions and that is executed prior to July 9, 1996, this requirement is effective on December 31, 1996.

(iv) A public utility member of a power pool, public utility holding company or other multi-lateral arrangement or agreement that contains transmission rates, terms or conditions and that is executed on or before July 9, 1996 must begin to take service under a joint pool-wide or system-wide pro forma tariff for wholesale trades among the pool or system members no later than December 31, 1996.

(d) *Waivers.* A public utility subject to the requirements of this section and Order No. 889, FERC Stats. & Regs. ¶31,037 (Final Rule on Open Access Same-Time Information System and

Standards of Conduct) may file a request for waiver of all or part of the requirements of this section, or Part 37 (Open Access Same-Time Information System and Standards of Conduct for Public Utilities), for good cause shown. Except as provided in paragraph (f) of this section, an application for waiver must be filed either:

(i) No later than July 9, 1996 or

(ii) No later than 60 days prior to the time the public utility would otherwise have to comply with the requirement.

(e) *Non-public utility procedures for tariff reciprocity compliance.* (1) A non-public utility may submit a transmission tariff and a request for declaratory order that its voluntary transmission tariff meets the requirements of Order No. 888 (Final Rule on Open Access and Stranded Costs).

(i) Any submittal and request for declaratory order submitted by a non-public utility will be provided an NJ (non-jurisdictional) docket designation.

(ii) If the submittal is found to be an acceptable transmission tariff, an applicant in a Federal Power Act (FPA) section 211 case against the non-public utility shall have the burden of proof to show why service under the open access tariff is not sufficient and why a section 211 order should be granted.

(2) A non-public utility may file a request for waiver of all or part of the reciprocity conditions contained in a public utility open access tariff, for good cause shown. An application for waiver may be filed at any time.

(f) *Standard generator interconnection procedures and agreements.* (1) Every public utility that is required to have on file a non-discriminatory open access transmission tariff under this section must amend such tariff by adding the standard interconnection procedures and agreement contained in Order No. 2003, FERC Stats. & Regs. & 31,146 (Final Rule on Generator Interconnection), as amended by the Commission in Order No. 661, FERC Stats. & Regs. ¶31,186 (Final Rule on Interconnection for Wind Energy), and the standard small generator interconnection procedures and agreement contained in Order No. 2006, FERC Stats. & Regs. ¶31,180 (Final Rule on Small Generator Interconnection), or such other interconnection procedures and agreements as may be approved by the Commission consistent with Order No. 2003, FERC Stats. & Regs. & 31,146 (Final Rule on Generator Interconnection) and Order No. 2006, FERC Stats. & Regs. ¶31,180 (Final Rule on Small Generator Interconnection).

(i) The amendment to implement the Final Rule on Generator Interconnection required by the preceding subsection must be filed no later than January 20, 2004.

(ii) The amendment to implement the Final Rule on Small Generator Interconnection required by the preceding subsection must be filed no later than August 12, 2005.

(iii) The amendment to implement the Final Rule on Interconnection for Wind Energy required by the preceding subsection must be filed no later than December 30, 2005.

(iv) Any public utility that seeks a deviation from the standard interconnection procedures and agreement contained in Order No. 2003, FERC Stats. & Regs. & 31,146 (Final Rule on Generator Interconnection), as amended by the Commission in Order No. 661, FERC Stats. & Regs. ¶31,186 (Final Rule on Interconnection for Wind Energy), or the standard small generator interconnection procedures and agreement contained in Order No. 2006, FERC Stats. & Regs. ¶31,180 (Final Rule on Small Generator Interconnection), must demonstrate that the deviation is consistent with the principles of either Order No. 2003, FERC Stats. & Regs. & 31,146 (Final Rule on Generator Interconnection) or Order No. 2006, FERC Stats. & Regs. ¶31,180 (Final Rule on Small Generator Interconnection).

(2) The non-public utility procedures for tariff reciprocity compliance described in paragraph (e) of this section are applicable to the standard interconnection procedures and agreements.

(3) A public utility subject to the requirements of this paragraph pertaining to the Final Rule on Generator Interconnection may file a request for waiver of all or part of the requirements of this paragraph, for good cause shown. An application for waiver must be filed either:

(i) No later than January 20, 2004, or

(ii) No later than 60 days prior to the time the public utility would otherwise have to comply with the requirements of this paragraph.

(4) A public utility subject to the requirements of this paragraph pertaining to the Final Rule on Small Generator Interconnection may file a request for waiver of all or part of the requirements of this paragraph, for good cause shown. An application for waiver must be filed either:

(i) No later than August 12, 2005, or

(ii) No later than 60 days prior to the time the public utility would otherwise have to comply with the requirements of this paragraph.

[Order 888, 61 FR 21693, May 10, 1996, as amended by Order 2003, 68 FR 49929, Aug. 19, 2003; Order 2006, 70 FR 34240, June 13, 2005; Order 661, 70 FR 75014, Dec. 19, 2005]

§ 35.29 Treatment of special assessments levied under the Atomic Energy Act of 1954, as amended by Title XI of the Energy Policy Act of 1992.

The costs that public utilities incur relating to special assessments under the Atomic Energy Act of 1954, as amended by the Energy Policy Act of 1992, are costs that may be reflected in jurisdictional rates. Public utilities seeking to recover the costs incurred relating to special assessments shall comply with the following procedures.

(a) *Fuel adjustment clauses.* In computing the Account 518 cost of nuclear fuel pursuant to §35.14(a)(6), utilities seeking to recover the costs of special assessments through their fuel adjustment clauses shall:

(1) Deduct any expenses associated with special assessments included in Account 518;

(2) Add to Account 518 one-twelfth of any payments made for special assessments within the 12-month period ending with the current month; and

(3) Deduct from Account 518 one-twelfth of any refunds of payments made for special assessments received within the 12-month period ending with the current month that is received from the Federal government because the public utility has contested a special assessment or overpaid a special assessment.

(b) *Cost of service data requirements.* Public utilities filing rate applications under §§35.12 or 35.13 (regardless of whether the utility elects the abbreviated, unadjusted Period I, adjusted Period I, or Period II cost support requirements) must submit cost data that is computed in accordance with the requirements specified in paragraphs (a) (1), (2) and (3) of this section.

(c) *Formula rates.* Public utilities with formula rates on file that provide for the automatic recovery of nuclear fuel costs must reflect the costs of special assessments in accordance with the requirements specified in paragraphs (a) (1), (2) and (3) of this section.

[Order 557, 58 FR 51221, Oct. 1, 1993. Redesignated by Order 888, 61 FR 21692, May 10, 1996]

Subpart D—Procedures and Requirements for Public Utility Sales of Power to Bonneville Power Administration Under Northwest Power Act

AUTHORITY: Federal Power Act, 16 U.S.C. 792–828c (1976 and Supp. IV 1980) and Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 830–839h (Supp. IV (1980)).

§ 35.30 General provisions.

(a) *Applicability.* This subpart applies to any sales of electric power subject to the Commission's jurisdiction under Part II of the Federal Power Act from public utilities to the Administrator of the Bonneville Power Administration (BPA) at the average system cost (ASC) of that utility's resources (electric power generation by the utility) pursuant to section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 830–839h. The ASC is determined by BPA in accordance with 18 CFR part 301.

(b) *Effectiveness of rates.* (1) During the period between the date of BPA's determination of ASC and the date of the final order issued by the Commission, the utility may charge the rate based on the ASC determined by BPA, subject to §35.31(c) of this part.

(2) Except as otherwise provided under this section, the ASC ordered by the Commission will be deemed in effect from the beginning of the relevant

exchange period, as defined in §301.1(b)(95) of this chapter. For any initial exchange period after the Commission approves a new ASC methodology, the ASC will be effective retroactively under this paragraph only if the utility files its new ASC within the time allowed under BPA procedures. Any utility that files a revised ASC with BPA in accordance with this paragraph must promptly file with the Commission a notice of timely filing of the new ASC.

(c) *Filing requirements.* Within 15 business days of the date of issuance of the BPA report on a utility's ASC, the utility must file with the Commission the ASC determined by BPA, the BPA written report, the utility's ASC schedules, material necessary to comply with 18 CFR 35.13(c), and any other material requested by the Commission or its staff.

[Order 337, 48 FR 46976, Oct. 17, 1983, as amended by Order 400, 49 FR 39300, Oct. 5, 1984]

§35.31 Commission review.

(a) *Procedures.* Filings under this subpart are subject to the procedures applicable to other filings under section 205 of the Federal Power Act, as the Commission deems appropriate.

(b) *Commission standard.* With respect to any filing under this subpart, the Commission will determine whether the ASC set by BPA for the applicable exchange period was determined in accordance with the ASC methodology set forth at 18 CFR 301.1. If the ASC is not in accord with the methodology, the Commission will order that BPA amend the ASC to conform with the methodology. If the ASC is in accord with the methodology, the rate is deemed just and reasonable.

(c) *Refunds and adjustments.* (1) Any ASC-based rate charged by a public utility under this subpart pending Commission order is subject to refund or to adjustment that increases the ASC-based rate.

(2) Any interest on refunds ordered by the Commission under this subpart is computed in accordance with 18 CFR 35.19a. Interest on any increase ordered by the Commission will be at the rate charged to BPA by the U.S. Treasury during that period, unless the Commission orders another interest rate.

(Approved by the Office of Management and Budget under control number 1902–0096)

[Order 337, 48 FR 46976, Oct. 17, 1983, as amended at 49 FR 1177, Jan. 10, 1984]

Subpart E—Regulations Governing Nuclear Plant Decommissioning Trust Funds

§35.32 General provisions.

(a) If a public utility has elected to provide for the decommissioning of a nuclear power plant through a nuclear plant decommissioning trust fund (Fund), the Fund must meet the following criteria:

(1) The Fund must be an external trust fund in the United States, established pursuant to a written trust agreement, that is independent of the utility, its subsidiaries, affiliates or associates. If the trust fund includes monies collected both in Commission-jurisdictional rates and in non-Commission-jurisdictional rates, then a separate account of the Commission-jurisdictional monies shall be maintained.

(2) The utility may provide overall investment policy to the Trustee or Investment Manager, but it may do so only in writing, and neither the utility nor its subsidiaries, affiliates or associates may serve as Investment Manager or otherwise engage in day-to-day management of the Fund or mandate individual investment decisions.

(3) The Fund's Investment Manager must exercise the standard of care, whether in investing or otherwise, that a prudent investor would use in the same circumstances. The term ''prudent investor'' means a prudent investor as described in Restatement of the Law (Third), Trusts §227, including general comments and reporter's notes, pages 8–101. St. Paul, MN: American Law Institute Publishers, (1992). ISBN 0–314–84246–2. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104, and are also available in local law libraries.

Copies may be inspected at the Federal Energy Regulatory Commission's Library, Room 95–01, 888 First Street, NE. Washington, DC or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

(4) The Trustee shall have a net worth of at least $100 million. In calculating the $100 million net worth requirement, the net worth of the Trustee's parent corporation and/or affiliates may be taken into account only if such entities guarantee the Trustee's responsibilities to the Fund.

(5) The Trustee or Investment Manager shall keep accurate and detailed accounts of all investments, receipts, disbursements and transactions of the Fund. All accounts, books and records relating to the Fund shall be open to inspection and audit at reasonable times by the utility or its designee or by the Commission or its designee. The utility or its designee must notify the Commission prior to performing any such inspection or audit. The Commission may direct the utility to conduct an audit or inspection.

(6) Absent the express authorization of the Commission, no part of the assets of the Fund may be used for, or diverted to, any purpose other than to fund the costs of decommissioning the nuclear power plant to which the Fund relates, and to pay administrative costs and other incidental expenses, including taxes, of the Fund.

(7) If the Fund balances exceed the amount actually expended for decommissioning after decommissioning has been completed, the utility shall return the excess jurisdictional amount to ratepayers, in a manner the Commission determines.

(8) Except for investments tied to market indexes or other mutual funds, the Investment Manager shall not invest in any securities of the utility for which it manages the funds or in that utility's subsidiaries, affiliates, or associates or their successors or assigns.

(9) The utility and the Fiduciary shall seek to obtain the best possible tax treatment of amounts collected for nuclear plant decommissioning. In this regard, the utility and the Fiduciary shall take maximum advantage of tax deductions and credits, when it is consistent with sound business practices to do so.

(10) Each utility shall deposit in the Fund at least quarterly all amounts included in Commission-jurisdictional rates to fund nuclear power plant decommissioning.

(b) The establishment, organization, and maintenance of the Fund shall not relieve the utility or its subsidiaries, affiliates or associates of any obligations it may have as to the decommissioning of the nuclear power plant. It is not the responsibility of the Fiduciary to ensure that the amount of monies that a Fund contains are adequate to pay for a nuclear unit's decommissioning.

(c) A utility may establish both qualified and non-qualified Funds with respect to a utility's interest in a specific nuclear plant. This section applies to both ''qualified'' (under the Internal Revenue Code, 26 U.S.C. 468A, or any successor section) and non-qualified Funds.

(d) A utility must regularly supply to the Fund's Investment Manager, and regularly update, essential information about the nuclear unit covered by the Trust Fund Agreement, including its description, location, expected remaining useful life, the decommissioning plan the utility proposes to follow, the utility's liquidity needs once decommissioning begins, and any other information that the Fund's Investment Manager would need to construct and maintain, over time, a sound investment plan.

(e) A utility should monitor the performance of all Fiduciaries of the Fund and, if necessary, replace them if they are not properly performing assigned responsibilities.

[Order 580–A, 62 FR 33348, June 19, 1997, as amended at 69 FR 18803, Apr. 9, 2004]

§ 35.33 Specific provisions.

(a) In addition to the general provisions of § 35.32, the Trustee must observe the provisions of this section.

(b) The Trustee may use Fund assets only to:

(1) Satisfy the liability of a utility for decommissioning costs of the nuclear power plant to which the Fund relates as provided by § 35.32; and

(2) Pay administrative costs and other incidental expenses, including taxes, of the Fund as provided by § 35.32.

(c) To the extent that the Trustee does not currently require the assets of the Fund for the purposes described in paragraphs (b)(1) and (b)(2) of this section, the Investment Manager, when investing Fund assets, must exercise the same standard of care that a reasonable person would exercise in the same circumstances. In this context, a ''reasonable person'' means a prudent investor as described in Restatement of the Law (Third), Trusts § 227, including general comments and reporter's notes, pages 8–101. St. Paul, MN: American Law Institute Publishers, 1992. ISBN 0–314–84246–2. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104, and are also available in local law libraries. Copies may be inspected at the Federal Energy Regulatory Commission's Library, Room 95–01, 888 First Street, NE. Washington, DC or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(d) The utility must submit to the Commission by March 31 of each year, one original and three conformed copies of the financial report furnished to the utility by the Fund's Trustee that shows for the previous calendar year:

(1) Fund assets and liabilities at the beginning of the period;

(2) Activity of the Fund during the period, including amounts received from the utility, a summary amount for purchases of fund investments and a summary amount for sales of fund investments, gains and losses from investment activity, disbursements from the Fund for decommissioning activity and payment of Fund expenses, including taxes; and

(3) Fund assets and liabilities at the end of the period. The report should not include the liability for decommissioning.

(4) Public utilities owning nuclear plants must maintain records of individual purchase and sales transactions until after decommissioning has been completed and any excess jurisdictional amounts have been returned to ratepayers in a manner that the Commission determines. The public utility need not include these records in the financial report that it furnishes to the Commission by March 31 of each year.

(e) The utility must also mail a copy of the financial report provided to the Commission pursuant to paragraph (d) of this section to anyone who requests it.

(f) If an independent public accountant has expressed an opinion on the report or on any portion of the report, then that opinion must accompany the report.

[Order 580–A, 62 FR 33348, June 19, 1997, as amended at 69 FR 18803, Apr. 9, 2004; Order 658, 70 FR 34343, June 14, 2005]

Subpart F—Procedures and Requirements Regarding Regional Transmission Organizations

§ 35.34 Regional Transmission Organizations.

(a) *Purpose.* This section establishes required characteristics and functions for Regional Transmission Organizations for the purpose of promoting efficiency and reliability in the operation and planning of the electric transmission grid and ensuring non-discrimination in the provision of electric transmission services. This section further directs each public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce to make certain filings with respect to forming and participating in a Regional Transmission Organization.

(b) *Definitions.* (1) *Regional Transmission Organization* means an entity that satisfies the minimum characteristics set forth in paragraph (j) of this

section, performs the functions set forth in paragraph (k) of this section, and accommodates the open architecture condition set forth in paragraph (l) of this section.

(2) *Market participant* means:

(i) Any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the Regional Transmission Organization, unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions; and

(ii) Any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions.

(3) *Affiliate* means the definition given in section 2(a)(11) of the Public Utility Holding Company Act (15 U.S.C. 79b(a)(11)).

(4) *Class of market participants* means two or more market participants with common economic or commercial interests.

(c) *General rule.* Except for those public utilities subject to the requirements of paragraph (h) of this section, every public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000 must file with the Commission, no later than October 15, 2000, one of the following:

(1) A proposal to participate in a Regional Transmission Organization consisting of one of the types of submittals set forth in paragraph (d) of this section; or

(2) An alternative filing consistent with paragraph (g) of this section.

(d) *Proposal to participate in a Regional Transmission Organization.* For purposes of this section, a proposal to participate in a Regional Transmission Organization means:

(1) Such filings, made individually or jointly with other entities, pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as are necessary to create a new Regional Transmission Organization;

(2) Such filings, made individually or jointly with other entities, pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as are necessary to join a Regional Transmission Organization approved by the Commission on or before the date of the filing; or

(3) A petition for declaratory order, filed individually or jointly with other entities, asking whether a proposed transmission entity would qualify as a Regional Transmission Organization and containing at least the following:

(i) A detailed description of the proposed transmission entity, including a description of the organizational and operational structure and the intended participants;

(ii) A discussion of how the transmission entity would satisfy each of the characteristics and functions of a Regional Transmission Organization specified in paragraphs (j), (k)and (l) of this section;

(iii) A detailed description of the Federal Power Act section 205 rates that will be filed for the Regional Transmission Organization; and

(iv) A commitment to make filings pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as necessary, promptly after the Commission issues an order in response to the petition.

(4) Any proposal filed under this paragraph (d) must include an explanation of efforts made to include public power entities and electric power cooperatives in the proposed Regional Transmission Organization.

(e) *Innovative transmission rate treatments for Regional Transmission Organizations.* (1) The Commission will consider authorizing any innovative transmission rate treatment, as discussed in this paragraph (e), for an approved Regional Transmission Organization. An applicant's request must include:

(i) A detailed explanation of how any proposed rate treatment would help achieve the goals of Regional Transmission Organizations, including efficient use of and investment in the transmission system and reliability benefits to consumers;

(ii) A cost-benefit analysis, including rate impacts; and

(iii) A detailed explanation of why the proposed rate treatment is appropriate for the Regional Transmission Organization.

The applicant must support any rate proposal under this paragraph (e) as just, reasonable, and not unduly discriminatory or preferential.

(2) For purposes of this paragraph (e), innovative transmission rate treatment means any of the following:

(i) A transmission rate moratorium, which may include proposals based on formerly bundled retail transmission rates;

(ii) Rates of return that:

(A) Are formulary;

(B) Consider risk premiums and account for demonstrated adjustments in risk; or

(C) Do not vary with capital structure;

(iii) Non-traditional depreciation schedules for new transmission investment;

(iv) Transmission rates based on levelized recovery of capital costs;

(v) Transmission rates that combine elements of incremental cost pricing for new transmission facilities with an embedded-cost access fee for existing transmission facilities; or

(vi) Performance-based transmission rates.

(3) A request for performance-based transmission rates under this paragraph (e) may include factors such as:

(i) A method for calculating initial transmission rates (including price caps and any provisions for discounting);

(ii) A mechanism for adjusting initial rates, which may be derived from or based upon external factors or indices or a specific performance measure;

(iii) Time periods for redetermining initial rates; and

(iv) Costs to be excluded from performance-based rates.

(4) An innovative transmission rate treatment or any other rate proposal made for an approved Regional Transmission Organization may be requested as part of any filing that is made under paragraph (d) of this section or in any subsequent rate change proposal under section 205 of the Federal Power Act (16 U.S.C. 824d). Unless otherwise ordered by the Commission, an approved Regional Transmission Organization may not include in rates any innovative transmission rate treatment under paragraphs (e)(2)(i) and (e)(2)(ii)(C) of this section after January 1, 2005.

(f) *Transfer of operational control.* Any public utility's proposal to participate in a Regional Transmission Organization filed pursuant to paragraph (c)(1) of this section must propose that operational control of that public utility's transmission facilities will be transferred to the Regional Transmission Organization on a schedule that will allow the Regional Transmission Organization to commence operating the facilities no later than December 15, 2001.

NOTE TO PARAGRAPH (f): The requirement in paragraph (f) of this section may be satisfied by proposing to transfer to the Regional Transmission Organization ownership of the facilities in addition to operational control.

(g) *Alternative filing.* Any filing made pursuant to paragraph (c)(2) of this section must contain:

(1) A description of any efforts made by that public utility to participate in a Regional Transmission Organization;

(2) A detailed explanation of the economic, operational, commercial, regulatory, or other reasons the public utility has not made a filing to participate in a Regional Transmission Organization, including identification of any existing obstacles to participation in a Regional Transmission Organization; and

(3) The specific plans, if any, the public utility has for further work toward participation in a Regional Transmission Organization, a proposed timetable for such activity, an explanation of efforts made to include public power entities in the proposed Regional Transmission Organization, and any factors (including any law, rule or regulation) that may affect the public utility's ability or decision to participate in a Regional Transmission Organization.

(h) *Public utilities participating in approved transmission entities.* Every public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000, and that has filed with the Commission on or before March 6, 2000 to transfer operational control of its facilities to a

transmission entity that has been approved or conditionally approved by the Commission on or before March 6, 2000 as being in conformance with the eleven ISO principles set forth in Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶31,036 (Final Rule on Open Access and Stranded Costs; see 61 FR 21540, May 10, 1996), must, individually or jointly with other entities, file with the Commission, no later than January 15, 2001:

(1) A statement that it is participating in a transmission entity that has been so approved;

(2) A detailed explanation of the extent to which the transmission entity in which it participates has the characteristics and performs the functions of a Regional Transmission Organization specified in paragraphs (j) and (k) of this section and accommodates the open architecture conditions in paragraph (l) of this section; and

(3) To the extent the transmission entity in which the public utility participates does not meet all the requirements of a Regional Transmission Organization specified in paragraphs (j), (k), and (l) of this section,

(i) A proposal to participate in a Regional Transmission Organization that meets such requirements in accordance with paragraph (d) of this section,

(ii) A proposal to modify the existing transmission entity so that it conforms to the requirements of a Regional Transmission Organization, or

(iii) A filing containing the information specified in paragraph (g) of this section addressing any efforts, obstacles, and plans with respect to conformance with those requirements.

(i) *Entities that become public utilities with transmission facilities.* An entity that is not a public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000, but later becomes such a public utility, must file a proposal to participate in a Regional Transmission Organization in accordance with paragraph (d) of this section, or an alternative filing in accordance with paragraph (g) of this section, by October 15, 2000 or 60 days prior to the date on which the public utility engages in any transmission of electric energy in interstate commerce, whichever comes later. If a proposal to participate in accordance with paragraph (d) of this section is filed, it must propose that operational control of the applicant's transmission system will be transferred to the Regional Transmission Organization within six months of filing the proposal.

(j) *Required characteristics for a Regional Transmission Organization.* A Regional Transmission Organization must satisfy the following characteristics when it commences operation:

(1) *Independence.* The Regional Transmission Organization must be independent of any market participant. The Regional Transmission Organization must include, as part of its demonstration of independence, a demonstration that it meets the following:

(i) The Regional Transmission Organization, its employees, and any nonstakeholder directors must not have financial interests in any market participant.

(ii) The Regional Transmission Organization must have a decision making process that is independent of control by any market participant or class of participants.

(iii) The Regional Transmission Organization must have exclusive and independent authority under section 205 of the Federal Power Act (16 U.S.C. 824d), to propose rates, terms and conditions of transmission service provided over the facilities it operates.

NOTE TO PARAGRAPH (j)(1)(iii): Transmission owners retain authority under section 205 of the Federal Power Act (16 U.S.C. 824d) to seek recovery from the Regional Transmission Organization of the revenue requirements associated with the transmission facilities that they own.

(iv)(A) The Regional Transmission Organization must provide:

(*1*) With respect to any Regional Transmission Organization in which market participants have an ownership interest, a compliance audit of the independence of the Regional Transmission Organization's decision making process under paragraph (j)(1)(ii) of this section, to be performed two years after approval of the Regional Transmission Organization, and every three

years thereafter, unless otherwise provided by the Commission.

(*2*) With respect to any Regional Transmission Organization in which market participants have a role in the Regional Transmission Organization's decision making process but do not have an ownership interest, a compliance audit of the independence of the Regional Transmission Organization's decision making process under paragraph (j)(1)(ii) of this section, to be performed two years after its approval as a Regional Transmission Organization.

(B) The compliance audits under paragraph (j)(1)(iv)(A) of this section must be performed by auditors who are not affiliated with the Regional Transmission Organization or transmission facility owners that are members of the Regional Transmission Organization.

(2) *Scope and regional configuration*. The Regional Transmission Organization must serve an appropriate region. The region must be of sufficient scope and configuration to permit the Regional Transmission Organization to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets.

(3) *Operational authority*. The Regional Transmission Organization must have operational authority for all transmission facilities under its control. The Regional Transmission Organization must include, as part of its demonstration of operational authority, a demonstration that it meets the following:

(i) If any operational functions are delegated to, or shared with, entities other than the Regional Transmission Organization, the Regional Transmission Organization must ensure that this sharing of operational authority will not adversely affect reliability or provide any market participant with an unfair competitive advantage. Within two years after initial operation as a Regional Transmission Organization, the Regional Transmission Organization must prepare a public report that assesses whether any division of operational authority hinders the Regional Transmission Organization in providing reliable, non-discriminatory and efficiently priced transmission service.

(ii) The Regional Transmission Organization must be the security coordinator for the facilities that it controls.

(4) *Short-term reliability*. The Regional Transmission Organization must have exclusive authority for maintaining the short-term reliability of the grid that it operates. The Regional Transmission Organization must include, as part of its demonstration with respect to reliability, a demonstration that it meets the following:

(i) The Regional Transmission Organization must have exclusive authority for receiving, confirming and implementing all interchange schedules.

(ii) The Regional Transmission Organization must have the right to order redispatch of any generator connected to transmission facilities it operates if necessary for the reliable operation of these facilities.

(iii) When the Regional Transmission Organization operates transmission facilities owned by other entities, the Regional Transmission Organization must have authority to approve or disapprove all requests for scheduled outages of transmission facilities to ensure that the outages can be accommodated within established reliability standards.

(iv) If the Regional Transmission Organization operates under reliability standards established by another entity (*e.g.*, a regional reliability council), the Regional Transmission Organization must report to the Commission if these standards hinder it from providing reliable, non-discriminatory and efficiently priced transmission service.

(k) *Required functions of a Regional Transmission Organization*. The Regional Transmission Organization must perform the following functions. Unless otherwise noted, the Regional Transmission Organization must satisfy these obligations when it commences operations.

(1) *Tariff administration and design*. The Regional Transmission Organization must administer its own transmission tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities.

As part of its demonstration with respect to tariff administration and design, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(1)(i) and (ii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization must be the only provider of transmission service over the facilities under its control, and must be the sole administrator of its own Commission-approved open access transmission tariff. The Regional Transmission Organization must have the sole authority to receive, evaluate, and approve or deny all requests for transmission service. The Regional Transmission Organization must have the authority to review and approve requests for new interconnections.

(ii) Customers under the Regional Transmission Organization tariff must not be charged multiple access fees for the recovery of capital costs for transmission service over facilities that the Regional Transmission Organization controls.

(2) *Congestion management.* The Regional Transmission Organization must ensure the development and operation of market mechanisms to manage transmission congestion. As part of its demonstration with respect to congestion management, the Regional Transmission Organization must satisfy the standards listed in paragraph (k)(2)(i) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The market mechanisms must accommodate broad participation by all market participants, and must provide all transmission customers with efficient price signals that show the consequences of their transmission usage decisions. The Regional Transmission Organization must either operate such markets itself or ensure that the task is performed by another entity that is not affiliated with any market participant.

(ii) The Regional Transmission Organization must satisfy the market mechanism requirement no later than one year after it commences initial operation. However, it must have in place at the time of initial operation an effective protocol for managing congestion.

(3) *Parallel path flow.* The Regional Transmission Organization must develop and implement procedures to address parallel path flow issues within its region and with other regions. The Regional Transmission Organization must satisfy this requirement with respect to coordination with other regions no later than three years after it commences initial operation.

(4) *Ancillary services.* The Regional Transmission Organization must serve as a provider of last resort of all ancillary services required by Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶ 31,036 (Final Rule on Open Access and Stranded Costs; see 61 FR 21540, May 10, 1996), and subsequent orders. As part of its demonstration with respect to ancillary services, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(4)(i) through (iii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) All market participants must have the option of self-supplying or acquiring ancillary services from third parties subject to any restrictions imposed by the Commission in Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶ 31,036 (Final Rule on Open Access and Stranded Costs), and subsequent orders.

(ii) The Regional Transmission Organization must have the authority to decide the minimum required amounts of each ancillary service and, if necessary, the locations at which these services must be provided. All ancillary service providers must be subject to direct or indirect operational control by the Regional Transmission Organization. The Regional Transmission Organization must promote the development of competitive markets for ancillary services whenever feasible.

(iii) The Regional Transmission Organization must ensure that its transmission customers have access to a real-time balancing market. The Regional Transmission Organization must either develop and operate this market

itself or ensure that this task is performed by another entity that is not affiliated with any market participant.

(5) *OASIS and Total Transmission Capability (TTC) and Available Transmission Capability (ATC).* The Regional Transmission Organization must be the single OASIS site administrator for all transmission facilities under its control and independently calculate TTC and ATC.

(6) *Market monitoring.* To ensure that the Regional Transmission Organization provides reliable, efficient and not unduly discriminatory transmission service, the Regional Transmission Organization must provide for objective monitoring of markets it operates or administers to identify market design flaws, market power abuses and opportunities for efficiency improvements, and propose appropriate actions. As part of its demonstration with respect to market monitoring, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(6)(i) through (k)(6)(iii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) Market monitoring must include monitoring the behavior of market participants in the region, including transmission owners other than the Regional Transmission Organization, if any, to determine if their actions hinder the Regional Transmission Organization in providing reliable, efficient and not unduly discriminatory transmission service.

(ii) With respect to markets the Regional Transmission Organization operates or administers, there must be a periodic assessment of how behavior in markets operated by others (*e.g.*, bilateral power sales markets and power markets operated by unaffiliated power exchanges) affects Regional Transmission Organization operations and how Regional Transmission Organization operations affect the efficiency of power markets operated by others.

(iii) Reports on opportunities for efficiency improvement, market power abuses and market design flaws must be filed with the Commission and affected regulatory authorities.

(7) *Planning and expansion.* The Regional Transmission Organization must be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities. As part of its demonstration with respect to planning and expansion, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(7)(i) and (ii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization planning and expansion process must encourage market-driven operating and investment actions for preventing and relieving congestion.

(ii) The Regional Transmission Organization's planning and expansion process must accommodate efforts by state regulatory commissions to create multi-state agreements to review and approve new transmission facilities. The Regional Transmission Organization's planning and expansion process must be coordinated with programs of existing Regional Transmission Groups (See § 2.21 of this chapter) where appropriate.

(iii) If the Regional Transmission Organization is unable to satisfy this requirement when it commences operation, it must file with the Commission a plan with specified milestones that will ensure that it meets this requirement no later than three years after initial operation.

(8) *Interregional coordination.* The Regional Transmission Organization must ensure the integration of reliability practices within an interconnection and market interface practices among regions.

(l) *Open architecture.* (1) Any proposal to participate in a Regional Transmission Organization must not contain any provision that would limit the capability of the Regional Transmission Organization to evolve in ways that would improve its efficiency, consistent with the requirements in paragraphs (j) and (k) of this section.

(2) Nothing in this regulation precludes an approved Regional Transmission Organization from seeking to

evolve with respect to its organizational design, market design, geographic scope, ownership arrangements, or methods of operational control, or in other appropriate ways if the change is consistent with the requirements of this section. Any future filing seeking approval of such changes must demonstrate that the proposed changes will meet the requirements of paragraphs (j), (k) and (l) of this section.

[Order 2000–A, 65 FR 12110, Mar. 8, 2000]

Subpart H—Wholesale Sales of Electric Energy at Market-Based Rates

SOURCE: 71 FR 9698, Feb. 27, 2006, unless otherwise noted.

§ 35.36 Generally.

(a) For purposes of this subpart, seller means any person that has authorization to engage in sales for resale of electric energy at market-based rates under section 205 of the Federal Power Act.

(b) The provisions of this subpart apply to all sellers authorized to make sales for resale of electric energy at market-based rates, unless otherwise ordered by the Commission.

§ 35.37 Market behavior rules.

(a) *Unit operation.* Where a seller participates in a Commission-approved organized market, seller will operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable power market. Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to seller through seller's participation in a Commission-approved organized market.

(b) *Communications.* Seller will provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless seller exercises due diligence to prevent such occurrences.

(c) *Price reporting.* To the extent seller engages in reporting of transactions to publishers of electricity or natural gas price indices, seller shall provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No. PL03–3–000 and any clarifications thereto. Unless seller has previously provided the Commission with a notification of its price reporting status, seller shall notify the Commission within 15 days of the effective date of this regulation whether it engages in such reporting of its transactions. Seller must update the notification within 15 days of any subsequent change in its transaction reporting status. In addition, Seller must adhere to such other standards and requirements for price reporting as the Commission may order.

(d) *Record retention.* Seller must retain, for a period of three years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to seller's market-based rate tariff, and the prices it reported for use in price indices.

PART 36—RULES CONCERNING APPLICATIONS FOR TRANSMISSION SERVICES UNDER SECTION 211 OF THE FEDERAL POWER ACT

AUTHORITY: 5 U.S.C. 551–557; 16 U.S.C. 791a–825r; 31 U.S.C. 9701; 42 U.S.C. 7107–7352.

§ 36.1 Notice provisions applicable to applications for transmission services under section 211 of the Federal Power Act.

(a) *Definitions.* (1) *Affected party* means each affected electric utility, each affected State regulatory authority, and each affected Federal power marketing agency.

(2) *Affected electric utility* means each electric utility that has made arrangements for the sale or purchase of electric energy to be transmitted pursuant to the particular application for transmission services, and each transmitting utility, as defined in section 3(23) of the Federal Power Act, 16 U.S.C. 796(23), being requested to transmit such electric energy.

(3) *Affected State regulatory authority* means a State regulatory authority, as defined in section 3(21) of the Federal Power Act, 16 U.S.C. 796(21), regulating the rates and charges of each affected electric utility.

(4) *Affected Federal power marketing agency* means a Federal power marketing agency that operates in the service area of each affected electric utility.

(b) *Additional filing requirements.* Any person filing an application for transmission services pursuant to section 211 of the Federal Power Act, 16 U.S.C. 824j, shall include the following:

(1) The applicant must include a form of notice of the application suitable for publication in the FEDERAL REGISTER in accordance with the specifications in §385.203(d) of this chapter. The form of notice shall be on electronic media as specified by the Secretary.

(2) A sworn statement that actual notice, including the applicant's name, the date of the application, the names of the affected parties, and a brief description of the transmission services sought (including the proposed dates for initiating and terminating the requested transmission services, the total amount of transmission capacity requested, a brief description of the character and nature of the transmission services being requested, and whether the transmission services requested are firm or non-firm) has been served, pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, §385.2010 of this chapter, on each affected party. Such statement shall enumerate each person so served.

(c) *Other filing requirements.* All other filing requirements of the Commission's Rules of Practice and Procedure remain in effect for applications under this section.

[Order 560, 58 FR 57737, Oct. 27, 1993, as amended by Order 593, 62 FR 1283, Jan. 9, 1997; Order 647, 69 FR 32438, June 10, 2004]

EFFECTIVE DATE NOTE: By Order 560, 58 FR 57737, Oct. 27, 1993, §36.1 was added. The section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

PART 37—OPEN ACCESS SAME-TIME INFORMATION SYSTEMS

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37.6 Information to be posted on the OASIS.
37.7 Auditing Transmission Service Information.
37.8 Obligations of OASIS users.

AUTHORITY: 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: Order 889, 61 FR 21764, May 10, 1996, unless otherwise noted.

§37.1 Applicability.

This part applies to any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce and to transactions performed under the *pro forma* tariff required in part 35 of this chapter.

§37.2 Purpose.

(a) The purpose of this part is to ensure that potential customers of open access transmission service receive access to information that will enable them to obtain transmission service on a non-discriminatory basis from any Transmission Provider. These rules provide standards of conduct and require the Transmission Provider (or its agent) to create and operate an Open Access Same-time Information System (OASIS) that gives all users of the open access transmission system access to the same information.

(b) The OASIS will provide information by electronic means about available transmission capability for point-to-point service and will provide a

process for requesting transmission service. OASIS will enable Transmission Providers and Transmission Customers to communicate promptly requests and responses to buy and sell available transmission capacity offered under the Transmission Provider's tariff.

§ 37.3 Definitions.

(a) *Transmission Provider* means any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce.

(b) *Transmission Customer* means any eligible customer (or its designated agent) that can or does execute a transmission service agreement or can or does receive transmission service.

(c) *Responsible party* means the Transmission Provider or an agent to whom the Transmission Provider has delegated the responsibility of meeting any of the requirements of this part.

(d) *Reseller* means any Transmission Customer who offers to sell transmission capacity it has purchased.

(e) *Wholesale merchant function* means the sale for resale of electric energy in interstate commerce.

(f) *Affiliate* means:

(1) For any exempt wholesale generator, as defined under section 32(a) of the Public Utility Holding Company Act of 1935, as amended, the same as provided in section 214 of the Federal Power Act; and

(2) For any other entity, the term *affiliate* has the same meaning as given in § 161.2(a) of this chapter.

[Order 889, 61 FR 21764, May 10, 1996, as amended by Order 889–A, 62 FR 12503, Mar. 14, 1997]

§ 37.4 [Reserved]

§ 37.5 Obligations of Transmission Providers and Responsible Parties.

(a) Each Transmission Provider is required to provide for the operation of an OASIS, either individually or jointly with other Transmission Providers, in accordance with the requirements of this Part. The Transmission Provider may delegate this responsibility to a Responsible Party such as another Transmission Provider, an Independent System Operator, a Regional Transmission Group, or a Regional Reliability Council.

(b) A Responsible Party must:

(1) Provide access to an OASIS providing standardized information relevant to the availability of transmission capacity, prices, and other information (as described in this Part) pertaining to the transmission system for which it is responsible;

(2) Operate the OASIS in compliance with the standardized procedures and protocols found in *OASIS Standards and Communication Protocols,* which can be obtained from the Public Reference and Files Maintenance Branch, Room 2A, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426; and

(3) Operate the OASIS in compliance with the *Business Practice Standards for Open Access Same-time Information System (OASIS) Transactions,* which can be obtained at the same address as provided in paragraph (b)(2) of this section.

(c) A Responsible Party may not deny or restrict access to an OASIS user merely because that user makes automated computer-to-computer file transfers or queries, or extensive requests for data.

(d) In the event that an OASIS user's grossly inefficient method of accessing an OASIS node or obtaining information from the node seriously degrades the performance of the node, a Responsible Party may limit a user's access to the OASIS node without prior Commission approval. The Responsible Party must immediately contact the OASIS user to resolve the problem. Notification of the restriction must be made to the Commission within two business days of the incident and include a description of the problem. A closure report describing how the problem was resolved must be filed with the Commission within one week of the incident.

(e) In the event that an OASIS user makes an error in a query, the Responsible Party can block the affected query and notify the user of the nature of the error. The OASIS user must correct the error before making any additional queries. If there is a dispute over

whether an error has occurred, the procedures in paragraph (d) of this section apply.

(f) Transmission Providers must provide ''read only'' access to the OASIS to Commission staff and the staffs of State regulatory authorities, at no cost, after such staff members have complied with the requisite registration procedures.

[Order 889, 61 FR 21764, May 10, 1996, as amended by Order 605, 64 FR 34124, June 25, 1999; Order 638, 65 FR 17400, Mar. 31, 2000]

§ 37.6 Information to be posted on the OASIS.

(a) The information posted on the OASIS must be in such detail and the OASIS must have such capabilities as to allow Transmission Customers to:

(1) Make requests for transmission services offered by Transmission Providers, Resellers and other providers of ancillary services;

(2) View and download in standard formats, using standard protocols, information regarding the transmission system necessary to enable prudent business decision making;

(3) Post, view, upload and download information regarding available products and desired services;

(4) Clearly identify the degree to which transmission service requests or schedules were denied or interrupted;

(5) Obtain access, in electronic format, to information to support available transmission capability calculations and historical transmission service requests and schedules for various audit purposes; and

(6) Make file transfers and automated computer-to-computer file transfers and queries as defined by the Standards and Communications Protocols Document.

(b) *Posting transmission capability.* The transmission capability that is expected to be available on the Transmission Provider's system (ATC) and the total transmission capability (TTC) of that system shall be calculated and posted for each Posted Path as set out in this section.

(1) *Definitions.* For purposes of this section the terms listed below have the following meanings:

(i) *Posted path* means any control area to control area interconnection; any path for which service is denied, curtailed or interrupted for more than 24 hours in the past 12 months; and any path for which a customer requests to have ATC or TTC posted. For this last category, the posting must continue for 180 days and thereafter until 180 days have elapsed from the most recent request for service over the requested path. For purposes of this definition, an hour includes any part of an hour during which service was denied, curtailed or interrupted.

(ii) *Constrained posted path* means any posted path having an ATC less than or equal to 25 percent of TTC at any time during the preceding 168 hours or for which ATC has been calculated to be less than or equal to 25 percent of TTC for any period during the current hour or the next 168 hours.

(iii) *Unconstrained posted path* means any posted path not determined to be a constrained posted path.

(iv) The word *interconnection*, as used in the definition of ''posted path'', means all facilities connecting two adjacent systems or control areas.

(2) *Calculation methods, availability of information, and requests.* (i) Information used to calculate any posting of ATC and TTC must be dated and time-stamped and all calculations shall be performed according to consistently applied methodologies referenced in the Transmission Provider's transmission tariff and shall be based on current industry practices, standards and criteria.

(ii) On request, the Responsible Party must make all data used to calculate ATC and TTC for any constrained posted paths publicly available (including the limiting element(s) and the cause of the limit (*e.g.*, thermal, voltage, stability)) in electronic form within one week of the posting. The information is required to be provided only in the electronic format in which it was created, along with any necessary decoding instructions, at a cost limited to the cost of reproducing the material. This information is to be retained for six months after the applicable posting period.

(iii) System planning studies or specific network impact studies performed for customers to determine network

impacts are to be made publicly available in electronic form on request and a list of such studies shall be posted on the OASIS. A study is required to be provided only in the electronic format in which it was created, along with any necessary decoding instructions, at a cost limited to the cost of reproducing the material. These studies are to be retained for two years.

(3) *Posting.* The ATC and TTC for all Posted Paths must be posted in megawatts by specific direction and in the manner prescribed in this subsection.

(i) *Constrained posted paths*—A) *For Firm ATC and TTC.* (*1*) The posting shall show ATC and TTC for a 30-day period. For this period postings shall be: by the hour, for the current hour and the 168 hours next following; and thereafter, by the day. If the Transmission Provider charges separately for on-peak and off-peak periods in its tariff, ATC and TTC will be posted daily for each period.

(*2*) Postings shall also be made by the month, showing for the current month and the 12 months next following.

(*3*) If planning and specific requested transmission studies have been done, seasonal capability shall be posted for the year following the current year and for each year following to the end of the planning horizon but not to exceed 10 years.

(B) *For Non-Firm ATC and TTC.* The posting shall show ATC and TTC for a 30-day period by the hour and days prescribed under paragraph (b)(3)(i)(A)(*1*) of this section and, if so requested, by the month and year as prescribed under paragraph (b)(3)(i)(A) (*2*) and (*3*) of this section.

(C) *Updating Posted Information for Constrained Paths. (1)* The capability posted under paragraphs (b)(3)(i) (A) and (B) of this section must be updated when transactions are reserved or service ends or whenever the TTC estimate for the Path changes by more than 10 percent.

(*2*) All updating of hourly information shall be made on the hour.

(ii) *Unconstrained posted paths.* (A) Postings of firm and nonfirm ATC and TTC shall be posted separately by the day, showing for the current day and the next six days following and thereafter, by the month for the 12 months next following. If the Transmission Provider charges separately for on-peak and off-peak periods in its tariff, ATC and TTC will be posted separately for the current day and the next six days following for each period. These postings are to be updated whenever the ATC changes by more than 20 percent of the Path's TTC.

(B) If planning and specific requested transmission studies have been done, seasonal capability shall be posted for the year following the current year and for each year following until the end of the planning horizon but not to exceed 10 years.

(c) *Posting Transmission Service Products and Prices.* (1) Transmission Providers must post prices and a summary of the terms and conditions associated with all transmission products offered to Transmission Customers.

(2) Transmission Providers must provide a downloadable file of their complete tariffs in the same electronic format as the tariff that is filed with the Commission.

(3) Any offer of a discount for any transmission service made by the Transmission Provider must be announced to all potential customers solely by posting on the OASIS.

(4) For any transaction for transmission service agreed to by the Transmission Provider and a customer, the Transmission Provider (at the time when ATC must be adjusted in response to the transaction), must post on the OASIS (and make available for download) information describing the transaction (including: price; quantity; points of receipt and delivery; length and type of service; identification of whether the transaction involves the Transmission Provider's wholesale merchant function or any affiliate; identification of what, if any, ancillary service transactions are associated with this transmission service transaction; and any other relevant terms and conditions) and shall keep such information posted on the OASIS for at least 30 days. A record of the transaction must be retained and kept available as part of the audit log required in § 37.7.

(5) Customers choosing to use the OASIS to offer for resale transmission

capacity they have purchased must post relevant information to the same OASIS as used by the one from whom the Reseller purchased the transmission capacity. This information must be posted on the same display page, using the same tables, as similar capability being sold by the Transmission Provider, and the information must be contained in the same downloadable files as the Transmission Provider's own available capability. A customer reselling transmission capacity without the use of an OASIS must, nevertheless, inform the original Transmission Provider of the transaction within any time limits prescribed by the Transmission Provider's tariff or in a contract or service agreement between the Transmission Provider and a customer.

(d) *Posting Ancillary Service Offerings and Prices.* (1) Any ancillary service required to be provided or offered under the *pro forma* tariff prescribed by part 35 of this chapter must be posted with the price of that service.

(2) Any offer of a discount for any ancillary service made by the Transmission Provider must be announced to all potential customers solely by posting on the OASIS.

(3) For any transaction for ancillary service agreed to by the Transmission Provider and a customer, the Transmission Provider (at the time when ATC must be adjusted in response to an associated transmission service transaction, if any), must post on the OASIS (and make available for download) information describing the transaction (including: date and time when the agreement was entered into; price; quantity; length and type of service; identification of whether the transaction involves the Transmission Provider's wholesale merchant function or any affiliate; identification of what, if any, transmission service transactions are associated with this ancillary service transaction; and any other relevant terms and conditions) and shall keep such information posted on the OASIS for at least 30 days. A record of the transaction must be retained and kept available as part of the audit log required in § 37.7.

(4) Any other interconnected operations service offered by the Transmission Provider may be posted, with the price for that service.

(5) Any entity offering an ancillary service shall have the right to post the offering of that service on the OASIS if the service is one required to be offered by the Transmission Provider under the *pro forma* tariff prescribed by part 35 of this chapter. Any entity may also post any other interconnected operations service voluntarily offered by the Transmission Provider. Postings by customers and third parties must be on the same page, and in the same format, as postings of the Transmission Provider.

(e) *Posting specific transmission and ancillary service requests and responses*—(1) *General rules.* (i) All requests for transmission and ancillary service offered by Transmission Providers under the *pro forma* tariff, including requests for discounts, must be made on the OASIS, and posted prior to the Transmission Provider responding to the request, except as discussed in paragraphs (e)(1) (ii) and (iii). The Transmission Provider must post all requests for transmission service and for ancillary service comparably. Requests for transmission and ancillary service, and the responses to such requests, must be conducted in accordance with the Transmission Provider's tariff, the Federal Power Act, and Commission regulations.

(ii) The requirement in paragraph (e)(1)(i) of this section, to post requests for transmission and ancillary service offered by Transmission Providers under the *pro forma* tariff, including requests for discounts, prior to the Transmission Provider responding to the request, does not apply to requests for next-hour service made during Phase I.

(iii) In the event that a discount is being requested for ancillary services that are not in support of basic transmission service provided by the Transmission Provider, such request need not be posted on the OASIS.

(iv) In processing a request for transmission or ancillary service, the Responsible Party shall post the same information as required in § 37.6(c)(4), § 37.6(d)(3), and the following information: the date and time when the request is made, its place in any queue,

the status of that request, and the result (accepted, denied, withdrawn).

(2) *Posting when a request for transmission service is denied.* (i) When a request for service is denied, the Responsible Party must provide the reason for that denial as part of any response to the request.

(ii) Information to support the reason for the denial, including the operating status of relevant facilities, must be maintained for 60 days and provided, upon request, to the potential Transmission Customer.

(iii) Any offer to adjust operation of the Transmission Provider's System to accommodate the denied request must be posted and made available to all Transmission Customers at the same time.

(3) *Posting when a transaction is curtailed or interrupted.* (i) When any transaction is curtailed or interrupted, the Transmission Provider must post notice of the curtailment or interruption on the OASIS, and the Transmission Provider must state on the OASIS the reason why the transaction could not be continued or completed.

(ii) Information to support any such curtailment or interruption, including the operating status of the facilities involved in the constraint or interruption, must be maintained and made available upon request, to the curtailed or interrupted customer, the Commission's Staff, and any other person who requests it, for three years.

(iii) Any offer to adjust the operation of the Transmission Provider's system to restore a curtailed or interrupted transaction must be posted and made available to all curtailed and interrupted Transmission Customers at the same time.

(f) *Posting Transmission Service Schedules Information.* Information on transmission service schedules must be recorded by the entity scheduling the transmission service and must be available on the OASIS for download. Transmission service schedules must be posted no later than seven calendar days from the start of the transmission service.

(g) *Posting Other Transmission-Related Communications.* (1) The posting of other communications related to transmission services must be provided for by the Responsible Party. These communications may include ''want ads'' and ''other communications'' (such as using the OASIS as a Transmission-related conference space or to provide transmission-related messaging services between OASIS users). Such postings carry no obligation to respond on the part of any market participant.

(2) The Responsible Party is responsible for posting other transmission-related communications in conformance with the instructions provided by the third party on whose behalf the communication is posted. It is the responsibility of the third party requesting such a posting to ensure the accuracy of the information to be posted.

(3) Notices of transfers of personnel shall be posted as described in §358.4(c). The posting requirements are the same as those provided in §37.7 for audit data postings.

(4) Logs detailing the circumstances and manner in which a Transmission Provider or Responsible Party exercised its discretion under any terms of the tariff shall be posted as described in §358.5(c)(4). The posting requirements are the same as those provided in §37.7 for audit data postings.

[Order 889, 61 FR 21764, May 10, 1996, as amended by Order 889–A, 62 FR 12503, Mar. 14, 1997; Order 605, 64 FR 34124, June 25, 1999; Order 2004, 68 FR 69157, Dec. 11, 2003]

§37.7 Auditing Transmission Service Information.

(a) All OASIS database transactions, except other transmission-related communications provided for under §37.6(g)(2), must be stored, dated, and time stamped.

(b) Audit data must remain available for download on the OASIS for 90 days, except ATC/TTC postings that must remain available for download on the OASIS for 20 days. The audit data are to be retained and made available upon request for download for three years from the date when they are first posted in the same electronic form as used when they originally were posted on the OASIS.

[Order 889, 61 FR 21764, May 10, 1996, as amended by Order 889–A, 62 FR 12504, Mar. 14, 1997]

§ 37.8 Obligations of OASIS users.

Each OASIS user must notify the Responsible Party one month in advance of initiating a significant amount of automated queries. The OASIS user must also notify the Responsible Party one month in advance of expected significant increases in the volume of automated queries.

[Order 605, 64 FR 34124, June 25, 1999]

PART 39—RULES CONCERNING CERTIFICATION OF THE ELECTRIC RELIABILITY ORGANIZATION; AND PROCEDURES FOR THE ESTABLISHMENT, APPROVAL, AND ENFORCEMENT OF ELECTRIC RELIABILITY STANDARDS

Sec.

AUTHORITY: 16 U.S.C. 824o.

SOURCE: Order 672, 71 FR 8736, Feb. 17, 2006, unless otherwise noted.

§ 39.1 Definitions.

As used in this part:

Bulk-Power System means facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof), and electric energy from generating facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

Cross-Border Regional Entity means a Regional Entity that encompasses a part of the United States and a part of Canada or Mexico.

Cybersecurity Incident means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communications networks including hardware, software and data that are essential to the Reliable Operation of the Bulk-Power System.

Electric Reliability Organization or ''*ERO*'' means the organization certified by the Commission under § 39.3 the purpose of which is to establish and enforce Reliability Standards for the Bulk-Power System, subject to Commission review.

Electric Reliability Organization Rule means, for purposes of this part, the bylaws, a rule of procedure or other organizational rule or protocol of the Electric Reliability Organization.

Interconnection means a geographic area in which the operation of Bulk-Power System components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain Reliable Operation of the facilities within their control.

Regional Advisory Body means an entity established upon petition to the Commission pursuant to section 215(j) of the Federal Power Act that is organized to advise the Electric Reliability Organization, a Regional Entity, or the Commission regarding certain matters in accordance with § 39.13.

Regional Entity means an entity having enforcement authority pursuant to § 39.8.

Regional Entity Rule means, for purposes of this part, the bylaws, a rule of procedure or other organizational rule or protocol of a Regional Entity.

Reliability Standard means a requirement approved by the Commission under section 215 of the Federal Power Act, to provide for Reliable Operation of the Bulk-Power System. The term includes requirements for the operation of existing Bulk-Power System facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for Reliable Operation of the Bulk-Power System, but the term does not include

any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

Reliable Operation means operating the elements of the Bulk-Power System within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a Cybersecurity Incident, or unanticipated failure of system elements.

Transmission Organization means a regional transmission organization, independent system operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

§ 39.2 Jurisdiction and applicability.

(a) Within the United States (other than Alaska and Hawaii), the Electric Reliability Organization, any Regional Entities, and all users, owners and operators of the Bulk-Power System, including but not limited to entities described in section 201(f) of the Federal Power Act, shall be subject to the jurisdiction of the Commission for the purposes of approving Reliability Standards established under section 215 of the Federal Power Act and enforcing compliance with section 215 of the Federal Power Act.

(b) All entities subject to the Commission's reliability jurisdiction under paragraph (a) of this section shall comply with applicable Reliability Standards, the Commission's regulations, and applicable Electric Reliability Organization and Regional Entity Rules made effective under this part.

(c) Each user, owner and operator of the Bulk-Power System within the United States (other than Alaska and Hawaii) shall register with the Electric Reliability Organization and the Regional Entity for each region within which it uses, owns or operates Bulk-Power System facilities, in such manner as prescribed in the Rules of the Electric Reliability Organization and each applicable Regional Entity.

(d) Each user, owner or operator of the Bulk-Power System within the United States (other than Alaska and Hawaii) shall provide the Commission, the Electric Reliability Organization and the applicable Regional Entity such information as is necessary to implement section 215 of the Federal Power Act as determined by the Commission and set out in the Rules of the Electric Reliability Organization and each applicable Regional Entity. The Electric Reliability Organization and each Regional Entity shall provide the Commission such information as is necessary to implement section 215 of the Federal Power Act.

§ 39.3 Electric Reliability Organization certification.

(a) Any person may submit an application to the Commission for certification as the Electric Reliability Organization no later than April 4, 2006. Such application shall comply with the requirements for filings in proceedings before the Commission in part 385 of this chapter.

(b) After notice and an opportunity for public comment, the Commission may certify one such applicant as an Electric Reliability Organization, if the Commission determines such applicant:

(1) Has the ability to develop and enforce, subject to § 39.7, Reliability Standards that provide for an adequate level of reliability of the Bulk-Power System, and

(2) Has established rules that:

(i) Assure its independence of users, owners and operators of the Bulk-Power System while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any Electric Reliability Organization committee or subordinate organizational structure;

(ii) Allocate equitably reasonable dues, fees and charges among end users for all activities under this part;

(iii) Provide fair and impartial procedures for enforcement of Reliability Standards through the imposition of penalties in accordance with § 39.7, including limitations on activities, functions, operations, or other appropriate sanctions or penalties;

(iv) Provide reasonable notice and opportunity for public comment, due

process, openness, and balance of interests in developing Reliability Standards, and otherwise exercising its duties; and

(v) Provide appropriate steps, after certification by the Commission as the Electric Reliability Organization, to gain recognition in Canada and Mexico.

(c) The Electric Reliability Organization shall submit an assessment of its performance three years from the date of certification by the Commission, and every five years thereafter. After receipt of the assessment, the Commission will establish a proceeding with opportunity for public comment in which it will review the performance of the Electric Reliability Organization.

(1) The Electric Reliability Organization's assessment of its performance shall include:

(i) An explanation of how the Electric Reliability Organization satisfies the requirements of §39.3(b);

(ii) Recommendations by Regional Entities, users, owners, and operators of the Bulk-Power System, and other interested parties for improvement of the Electric Reliability Organization's operations, activities, oversight and procedures, and the Electric Reliability Organization's response to such recommendations; and

(iii) The Electric Reliability Organization's evaluation of the effectiveness of each Regional Entity, recommendations by the Electric Reliability Organization, users, owners, and operators of the Bulk-Power System, and other interested parties for improvement of the Regional Entity's performance of delegated functions, and the Regional Entity's response to such evaluation and recommendations.

(2) The Commission will issue an order finding that the Electric Reliability Organization meets the statutory and regulatory criteria or directing the Electric Reliability Organization or a Regional Entity to come into compliance with or improve its compliance with the requirements of this part. If the ERO fails to comply adequately with the Commission order, the Commission may institute a proceeding to enforce its order, including, if necessary and appropriate, a proceeding to consider decertification of the ERO consistent with §39.9. The Commission will issue an order finding that each Regional Entity meets the statutory and regulatory criteria or directing the Regional Entity to come into compliance with or improve its compliance with the requirements of this part. If a Regional Entity fails to comply adequately with the Commission order, the Commission may institute a proceeding to enforce its order, including, if necessary and appropriate, a proceeding to consider rescission of its approval of the Regional Entity's delegation agreement.

§39.4 Funding of the Electric Reliability Organization.

(a) Any person who submits an application for certification as the Electric Reliability Organization shall include in its application a formula or method for the allocation and assessment of Electric Reliability Organization dues, fees and charges. The certified Electric Reliability Organization may subsequently file with the Commission a request to modify the formula or method.

(b) The Electric Reliability Organization shall file with the Commission its proposed entire annual budget for statutory and any non-statutory activities, including the entire annual budget for statutory and any non-statutory activities of each Regional Entity, with supporting materials, including the ERO's and each Regional Entity's complete business plan and organization chart, explaining the proposed collection of all dues, fees and charges and the proposed expenditure of funds collected in sufficient detail to justify the requested funding collection and budget expenditures 130 days in advance of the beginning of each Electric Reliability Organization fiscal year. The annual Electric Reliability Organization budget shall include line item budgets for the activities of each Regional Entity that are delegated or assigned to each Regional Entity pursuant to §39.8.

(c) The Commission, after public notice and opportunity for hearing, will issue an order either accepting, rejecting, remanding or modifying the proposed Electric Reliability Organization budget and business plan no later than

sixty (60) days in advance of the beginning of the Electric Reliability Organization's fiscal year.

(d) On a demonstration of unforeseen and extraordinary circumstances requiring additional funds prior to the next Electric Reliability Organization fiscal year, the Electric Reliability Organization may file with the Commission for authorization to collect a special assessment. Such filing shall include supporting materials explaining the proposed collection in sufficient detail to justify the requested funding, including any departure from the approved funding formula or method. After notice and an opportunity for hearing, the Commission will approve, disapprove, remand or modify such request.

(e) All entities within the Commission's jurisdiction as set forth in section 215(b) of the Federal Power Act shall pay any Electric Reliability Organization assessment of dues, fees and charges as approved by the Commission, in a timely manner reasonably as designated by the Electric Reliability Organization.

(f) Any person who submits an application for certification as the Electric Reliability Organization may include in the application a plan for a transitional funding mechanism that would allow such person, if certified as the Electric Reliability Organization, to continue existing operations without interruption as it transitions from one method of funding to another. Any proposed transitional funding plan should terminate no later than eighteen (18) months from the date of Electric Reliability Organization certification.

(g) The Electric Reliability Organization or a Regional Entity may not engage in any activity or receive revenues from any person that, in the judgment of the Commission represents a significant distraction from, or a conflict of interest with, its responsibilities under this part.

§ 39.5 Reliability Standards.

(a) The Electric Reliability Organization shall file each Reliability Standard or modification to a Reliability Standard that it proposes to be made effective under this part with the Commission. The filing shall include a concise statement of the basis and purpose of the proposed Reliability Standard, either a summary of the Reliability Standard development proceedings conducted by the Electric Reliability Organization or a summary of the Reliability Standard development proceedings conducted by a Regional Entity together with a summary of the Reliability Standard review proceedings of the Electric Reliability Organization, and a demonstration that the proposed Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.

(b) The Electric Reliability Organization shall rebuttably presume that a proposal for a Reliability Standard or a modification to a Reliability Standard to be applicable on an Interconnection-wide basis is just, reasonable, not unduly discriminatory or preferential, and in the public interest, if such proposal is from a Regional Entity organized on an Interconnection-wide basis.

(c) The Commission may approve by rule or order a proposed Reliability Standard or a proposed modification to a Reliability Standard if, after notice and opportunity for public hearing, it determines that the proposed Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.

(1) The Commission will give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed Reliability Standard or a proposed modification to a Reliability Standard,

(2) The Commission will give due weight to the technical expertise of a Regional Entity organized on an Interconnection-wide basis with respect to a proposed Reliability Standard or a proposed modification to a Reliability Standard to be applicable within that Interconnection, and

(3) The Commission will not defer to the Electric Reliability Organization or a Regional Entity with respect to the effect of a proposed Reliability Standard or a proposed modification to a Reliability Standard on competition.

(d) An approved Reliability Standard or modification to a Reliability Standard shall take effect as approved by the Commission.

(e) The Commission will remand to the Electric Reliability Organization for further consideration a proposed Reliability Standard or modification to a Reliability Standard that the Commission disapproves in whole or in part.

(f) The Commission may, upon its own motion or a complaint, order the Electric Reliability Organization to submit a proposed Reliability Standard or modification to a Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Reliability Standard appropriate to carry out section 215 of the Federal Power Act.

(g) The Commission, when remanding a Reliability Standard to the Electric Reliability Organization or ordering the Electric Reliability Organization to submit to the Commission a proposed Reliability Standard or proposed modification to a Reliability Standard that addresses a specific matter may order a deadline by which the Electric Reliability Organization must submit a proposed or modified Reliability Standard.

§ 39.6 Conflict of a Reliability Standard with a Commission Order.

(a) If a user, owner or operator of the transmission facilities of a Transmission Organization determines that a Reliability Standard may conflict with a function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission with respect to such Transmission Organization, the Transmission Organization shall expeditiously notify the Commission, the Electric Reliability Organization and the relevant Regional Entity of the possible conflict.

(b) After notice and opportunity for hearing, within sixty (60) days of the date that a notice was filed under paragraph (a) of this section, unless the Commission orders otherwise, the Commission will issue an order determining whether a conflict exists and, if so, resolve the conflict by directing:

(1) The Transmission Organization to file a modification of the conflicting function, rule, order, tariff, rate schedule, or agreement pursuant to section 205 or 206 of the Federal Power Act, as appropriate, or

(2) The Electric Reliability Organization to propose a modification to the conflicting Reliability Standard pursuant to §39.5 of the Commission's regulations.

(c) The Transmission Organization shall continue to comply with the function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission until the Commission finds that a conflict exists, the Commission orders a change to such provision pursuant to section 205 or 206 of the Federal Power Act, and the ordered change becomes effective.

[Order 672, 71 FR 8736, Feb. 17, 2006, as amended at 71 FR 11505, Mar. 8, 2006]

§ 39.7 Enforcement of Reliability Standards.

(a) The Electric Reliability Organization and each Regional Entity shall have an audit program that provides for rigorous audits of compliance with Reliability Standards by users, owners and operators of the Bulk-Power System.

(b) The Electric Reliability Organization and each Regional Entity shall have procedures to report promptly to the Commission any self-reported violation or investigation of a violation or an alleged violation of a Reliability Standard and its eventual disposition.

(1) Any person that submits an application to the Commission for certification as an Electric Reliability Organization shall include in such application a proposal for the prompt reporting to the Commission of any self-reported violation or investigation of a violation or an alleged violation of a Reliability Standard and its eventual disposition.

(2) Any agreement for the delegation of enforcement authority to a Regional Entity shall include a provision for the prompt reporting through the Electric Reliability Organization to the Commission of any self-reported violation or investigation of a violation or an alleged violation of a Reliability Standard and its eventual disposition.

(3) Each report of a violation or alleged violation by a user, owner or operator of the Bulk-Power System shall include the user's, owner's or operator's name, which Reliability Standard or Reliability Standards were violated

or allegedly violated, when the violation or alleged violation occurred, and the name of a person knowledgeable about the violation or alleged violation to serve as a point of contact with the Commission.

(4) Each violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty or resolved by an admission that the user, owner or operator of the Bulk-Power System violated a Reliability Standard or by a settlement or other negotiated disposition. The disposition of each violation or alleged violation that relates to a Cybersecurity Incident or that would jeopardize the security of the Bulk-Power System if publicly disclosed shall be nonpublic unless the Commission directs otherwise.

(5) The Electric Reliability Organization, and each Regional Entity through the ERO, shall file such periodic summary reports as the Commission shall from time to time direct on violations of Reliability Standards and summary analyses of such violations.

(c) The Electric Reliability Organization, or a Regional Entity, may impose, subject to section 215(e) of the Federal Power Act, a penalty on a user, owner or operator of the Bulk-Power System for a violation of a Reliability Standard approved by the Commission if, after notice and opportunity for hearing:

(1) The Electric Reliability Organization or the Regional Entity finds that the user, owner or operator has violated a Reliability Standard approved by the Commission; and

(2) The Electric Reliability Organization files a notice of penalty and the record of its or a Regional Entity's proceeding with the Commission. Simultaneously with the filing of a notice of penalty with the Commission, the Electric Reliability Organization shall serve a copy of the notice of penalty on the entity that is the subject of the penalty.

(d) A notice of penalty by the Electric Reliability Organization shall consist of:

(1) The name of the entity on whom the penalty is imposed;

(2) Identification of each Reliability Standard violated;

(3) A statement setting forth findings of fact with respect to the act or practice resulting in the violation of each Reliability Standard;

(4) A statement describing any penalty imposed;

(5) The record of the proceeding;

(6) A form of notice suitable for publication; and

(7) Other matters the Electric Reliability Organization or the Regional Entity, as appropriate, may find relevant.

(e) A penalty imposed under this section may take effect not earlier than the thirty-first (31st) day after the Electric Reliability Organization files with the Commission the notice of penalty and the record of the proceedings.

(1) Such penalty will be subject to review by the Commission, on its own motion or upon application by the user, owner or operator of the Bulk-Power System that is the subject of the penalty filed within thirty (30) days after the date such notice is filed with Commission. In the absence of the filing of an application for review or motion or other action by the Commission, the penalty shall be affirmed by operation of law upon the expiration of the thirty (30)-day period for filing of an application for review.

(2) An applicant filing an application for review shall comply with the requirements for filings in proceedings before the Commission. An application shall contain a complete and detailed explanation of why the applicant believes that the Electric Reliability Organization or Regional Entity erred in determining that the applicant violated a Reliability Standard, or in determining the appropriate form or amount of the penalty. The applicant may support its explanation by providing information that is not included in the record submitted by the Electric Reliability Organization.

(3) Application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty.

(4) Any answer, intervention or comment to an application for review of a penalty imposed under this part must be filed within twenty (20) days after the application is filed, unless otherwise ordered by the Commission.

(5) In any proceeding to review a penalty imposed under this part, the Commission, after public notice and opportunity for hearing (which hearing may consist solely of the record before the Electric Reliability Organization or Regional Entity and the opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), will by order affirm, set aside, or modify the penalty or may remand the determination of a violation or the form or amount of the penalty to the Electric Reliability Organization for further consideration. The Commission may establish a hearing before an administrative law judge or initiate such further procedures as it determines to be appropriate, before issuing such an order. In the case of a remand to the Electric Reliability Organization, the Electric Reliability Organization may remand the matter to a Regional Entity for further consideration and resubmittal through the Electric Reliability Organization to the Commission.

(6) The Commission will take action on an application for review of a penalty within sixty (60) days of the date the application is filed unless the Commission determines on a case-by-case basis that an alternative expedited procedure is appropriate.

(7) A proceeding for Commission review of a penalty for violation of a Reliability Standard will be public unless the Commission determines that a nonpublic proceeding is necessary and lawful, including a proceeding involving a Cybersecurity Incident. For a nonpublic proceeding, the user, owner or operator of the Bulk-Power System that is the subject of the penalty will be given timely notice and an opportunity for hearing and the public will not be notified and the public will not be allowed to participate.

(f) On its own motion or upon complaint, the Commission may order compliance with a Reliability Standard and may impose a penalty against a user, owner or operator of the Bulk-Power System, if the Commission finds, after public notice and opportunity for hearing, that the user, owner or operator of the Bulk-Power System has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a Reliability Standard.

(g) Any penalty imposed for the violation of a Reliability Standard shall bear a reasonable relation to the seriousness of the violation and shall take into consideration efforts of such user, owner or operator of the Bulk-Power System to remedy the violation in a timely manner.

(1) The penalty imposed may be a monetary or a non-monetary penalty and may include, but is not limited to, a limitation on an activity, function, operation, or other appropriate sanction, including being added to a reliability watch list composed of major violators that is established by the Electric Reliability Organization, a Regional Entity or the Commission.

(2) The Electric Reliability Organization shall submit for Commission approval penalty guidelines that set forth a range of penalties for the violation of Reliability Standards. A penalty imposed by the Electric Reliability Organization or a Regional Entity must be within be within the range set forth in the penalty guidelines.

§ 39.8 Delegation to a Regional Entity.

(a) The Electric Reliability Organization may enter into an agreement to delegate authority to a Regional Entity for the purpose of proposing Reliability Standards to the Electric Reliability Organization and enforcing Reliability Standards under § 39.7.

(b) After notice and opportunity for comment, the Commission may approve a delegation agreement. A delegation agreement shall not be effective until it is approved by the Commission.

(c) The Electric Reliability Organization shall file a delegation agreement. Such filing shall include a statement demonstrating that:

(1) The Regional Entity is governed by an independent board, a balanced stakeholder board, or a combination independent and balanced stakeholder board;

(2) The Regional Entity otherwise satisfies the provisions of section 215(c) of the Federal Power Act; and

(3) The agreement promotes effective and efficient administration of Bulk-Power System reliability.

(d) The Commission may modify such delegation.

(e) The Electric Reliability Organization shall and the Commission will rebuttably presume that a proposal for delegation to a Regional Entity organized on an Interconnection-wide basis promotes effective and efficient administration of Bulk-Power System reliability and should be approved.

(f) An entity seeking to enter into a delegation agreement that is unable to reach an agreement with the Electric Reliability Organization within 180 days after proposing a delegation agreement to the Electric Reliability Organization may apply to the Commission to assign to it the Electric Reliability Organization's authority to enforce Reliability Standards within its region. The entity must demonstrate in its application that it meets the requirements of paragraph (c) of this section and that continued negotiations with the Electric Reliability Organization would not likely result in an appropriate delegation agreement within a reasonable period of time. After notice and opportunity for hearing, the Commission may designate the entity as a Regional Entity and assign enforcement authority to it.

(g) An application pursuant to paragraph (f) of this section must state:

(1) Whether the Commission's Dispute Resolution Service, or other alternative dispute resolution procedures were used, or why these procedures were not used; and

(2) Whether the Regional Entity believes that alternative dispute resolution under the Commission's supervision could successfully resolve the disputes regarding the terms of the delegation agreement.

§ 39.9 Enforcement of Commission Rules and Orders.

(a) The Commission may take such action as is necessary and appropriate against the Electric Reliability Organization or a Regional Entity to ensure compliance with a Reliability Standard or any Commission order affecting the Electric Reliability Organization or a Regional Entity, including, but not limited to:

(1) After notice and opportunity for hearing, imposition of civil penalties under the Federal Power Act.

(2) After notice and opportunity for hearing, suspension or decertification of the Commission's certification to be the Electric Reliability Organization.

(3) After notice and opportunity for hearing, suspension or rescission of the Commission's approval of an agreement to delegate certain Electric Reliability Organization authorities to a Regional Entity.

(b) The Commission may periodically audit the Electric Reliability Organization's performance under this part.

§ 39.10 Changes to an Electric Reliability Organization Rule or Regional Entity Rule.

(a) The Electric Reliability Organization shall file with the Commission for approval any proposed Electric Reliability Organization Rule or Rule change. A Regional Entity shall submit a Regional Entity Rule or Rule change to the Electric Reliability Organization and, if approved by the Electric Reliability Organization, the Electric Reliability Organization shall file the proposed Regional Entity Rule or Rule change with the Commission for approval. Any filing by the Electric Reliability Organization shall be accompanied by an explanation of the basis and purpose for the Rule or Rule change, together with a description of the proceedings conducted by the Electric Reliability Organization or Regional Entity to develop the proposal.

(b) The Commission, upon its own motion or upon complaint, may propose a change to an Electric Reliability Organization Rule or Regional Entity Rule.

(c) A proposed Electric Reliability Organization Rule or Rule change or Regional Entity Rule or Rule change shall take effect upon a finding by the Commission, after notice and opportunity for public comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of § 39.3.

§ 39.11 Reliability reports.

(a) The Electric Reliability Organization shall conduct assessments as determined by the Commission of the reliability of the Bulk-Power System in North America and provide a report to the Commission and provide subsequent reports of the same to the Commission.

(b) The Electric Reliability Organization shall conduct assessments of the adequacy of the Bulk-Power System in North America and report its findings to the Commission, the Secretary of Energy, each Regional Entity, and each Regional Advisory Body annually or more frequently if so ordered by the Commission.

§ 39.12 Review of state action.

(a) Nothing in this section shall be construed to preempt any authority of any state to take action to ensure the safety, adequacy, and reliability of electric service within that state, as long as such action is not inconsistent with any Reliability Standard, except that the State of New York may establish rules that result in greater reliability within that state, as long as such action does not result in lesser reliability outside the state than that provided by the Reliability Standards.

(b) Where a state takes action to ensure the safety, adequacy, or reliability of electric service, the Electric Reliability Organization, a Regional Entity or other affected person may apply to the Commission for a determination of consistency of the state action with a Reliability Standard.

(1) The application shall:

(i) Identify the state action;

(ii) Identify the Reliability Standard with which the state action is alleged to be inconsistent;

(iii) State the basis for the allegation that the state action is inconsistent with the Reliability Standard; and

(iv) Be served on the relevant state agency and the Electric Reliability Organization, concurrent with its filing with the Commission.

(2) Within ninety (90) days of the application of the Electric Reliability Organization, the Regional Entity, or other affected person, and after notice and opportunity for public comment, the Commission will issue a final order determining whether the state action is inconsistent with a Reliability Standard, taking into consideration any recommendation of the Electric Reliability Organization and the state.

(c) The Commission, after consultation with the Electric Reliability Organization and the state taking action, may stay the effectiveness of the state action, pending the Commission's issuance of a final order.

§ 39.13 Regional Advisory Bodies.

(a) The Commission will establish a Regional Advisory Body on the petition of at least two-thirds of the states within a region that have more than one-half of their electric load served within the region.

(b) A petition to establish a Regional Advisory Body shall include a statement that the Regional Advisory Body is composed of one member from each participating state in the region, appointed by the governor of each state, and may include representatives of agencies, states and provinces outside the United States.

(c) A Regional Advisory Body established by the Commission may provide advice to the Electric Reliability Organization or a Regional Entity or the Commission regarding:

(1) The governance of an existing or proposed Regional Entity within the same region;

(2) Whether a Reliability Standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest;

(3) Whether fees for all activities under this part proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest; and

(4) Any other responsibilities requested by the Commission.

(d) The Commission may give deference to the advice of a Regional Advisory Body established by the Commission that is organized on an Interconnection-wide basis.

PART 41—ACCOUNTS, RECORDS, MEMORANDA AND DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

CERTIFICATION OF COMPLIANCE WITH ACCOUNTING REGULATIONS

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 42 U.S.C. 7101–7352.

SOURCE: Order 141, 12 FR 8500, Dec. 19, 1947, unless otherwise noted.

CROSS REFERENCE: For rules of practice and procedure, see part 385 of this chapter.

DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

§41.1 Notice to audited person.

(a) *Applicability*. This part applies to all audits conducted by the Commission or its staff under authority of the Federal Power Act except for Electric Reliability Organization audits conducted pursuant to the authority of part 39 of this chapter.

(b) *Notice*. An audit conducted by the Commission's staff under authority of the Federal Power Act may result in a notice of deficiency or audit report or similar document containing a finding or findings that the audited person has not complied with a requirement of the Commission with respect to, but not limited to, the following: A filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; matters under the Standards of Conduct or the Code of Conduct; and the activities or operations of the audited person. The notice of deficiency, audit report or similar document may also contain one or more proposed remedies that address findings of noncompliance. Where such findings, with or without proposed remedies, appear in a notice of deficiency, audit report or similar document, such document shall be provided to the audited person, and the finding or findings, and any proposed remedies, shall be noted and explained. The audited person shall timely indicate in a written response any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees. Any initial order that the Commission subsequently may issue with respect to the notice of deficiency, audit report or similar document shall note, but not address on the merits, the finding or findings, or the proposed remedy or remedies, or both, in any combination, with which the audited person disagreed. The Commission shall provide the audited person 30 days to respond with respect to the finding or findings or any proposed remedy or remedies, or both, in any combination, with which it disagreed.

[Order 675, 71 FR 9706, Feb. 27, 2006]

§41.2 Response to notification.

Upon issuance of a Commission order that notes a finding or findings, or proposed remedy or remedies, or both, in any combination, with which the audited person has disagreed, the audited person may: Acquiesce in the findings and/or proposed remedies by not timely responding to the Commission order, in which case the Commission may issue an order approving them or taking other action; or challenge the finding or findings and/or any proposed remedies, with which it disagreed by timely notifying the Commission in writing that it requests Commission review by means of a shortened procedure or, if there are material facts in dispute which require cross-examination, a trial-type hearing.

[Order 675, 71 FR 9706, Feb. 27, 2006]

§41.3 Shortened procedure.

If the audited person subject to a Commission order described in §41.1 notifies the Commission that it seeks to challenge one or more audit findings, or proposed remedies, or both, in any combination, by the shortened procedure, the Commission shall thereupon

issue a notice setting a schedule for the filing of memoranda. The person electing the use of the shortened procedure, and any other interested entities, including the Commission staff, shall file, within 45 days of the notice, an initial memorandum that addresses the relevant facts and applicable law that support the position or positions taken regarding the matters at issue. Reply memoranda shall be filed within 20 days of the date by which the initial memoranda are due to be filed. Only participants who filed initial memoranda may file reply memoranda. Subpart T of part 385 of this chapter shall apply to all filings. Within 20 days after the last date that reply memoranda under the shortened procedure may be timely filed, the audited person who elected the shortened procedure may file a motion with the Commission requesting a trial-type hearing if new issues are raised by a party. To prevail in such a motion, the audited person must show that a party to the shortened procedure raised one or more new issues of material fact relevant to resolution of a matter in the shortened procedure such that fundamental fairness requires a trial-type hearing to resolve the new issue or issues so raised. Parties to the shortened procedure and the Commission staff may file responses to the motion. In ruling upon the motion, the Commission may determine that some or all of the issues be litigated in a trial-type hearing.

[Order 675, 71 FR 9706, Feb. 27, 2006]

§ 41.4 Form and style.

Each copy of such memorandum must be complete in itself. All pertinent data should be set forth fully, and each memorandum should set out the facts and argument as prescribed for briefs in § 385.706 of this chapter.

[Order 141, 12 FR 8500, Dec. 19, 1947, as amended by Order 225, 47 FR 19056, May 3, 1982]

§ 41.5 Verification.

The facts stated in the memorandum must be sworn to by persons having knowledge thereof, which latter fact must affirmatively appear in the affidavit. Except under unusual circumstances, such persons should be those who would appear as witnesses if hearing were had to testify as to the facts stated in the memorandum.

§ 41.6 Determination.

If no formal hearing is had the matter in issue will be determined by the Commission on the basis of the facts and arguments submitted.

§ 41.7 Assignment for oral hearing.

Except when there are no material facts in dispute, when a person does not consent to the shortened procedure, the Commission will assign the proceeding for hearing as provided by subpart E of part 385 of this chapter. Notwithstanding a person's not giving consent to the shortened procedure, and instead seeking assignment for hearing as provided for by subpart E of part 385 of this chapter, the Commission will not assign the proceeding for a hearing when no material facts are in dispute. The Commission may also, in its discretion, at any stage in the proceeding, set the proceeding for hearing.

[Order 575, 60 FR 4854, Jan. 25, 1995]

§ 41.8 Burden of proof.

The burden of proof to justify every accounting entry shall be on the person making, authorizing, or requiring such entry.

CERTIFICATION OF COMPLIANCE WITH ACCOUNTING REGULATIONS

§ 41.10 Examination of accounts.

(a) All Major and Nonmajor public utilities and licensees not classified as Class C or Class D prior to January 1, 1984 shall secure, for the year 1968 and each year thereafter until December 31, 1975, the services of an independent certified public accountant, or independent licensed public accountant, certified or licensed by a regulatory authority of a State or other political subdivision of the United States, to test compliance in all material respects of those schedules as are indicated in the General Instructions set out in the Annual Report, Form No. 1, with the Commission's applicable Uniform System of Accounts and published accounting releases. The Commission

expects that identification of questionable matters by the independent accountant will facilitate their early resolution and that the independent accountant will seek advisory rulings by the Commission on such items. This examination shall be deemed supplementary to periodic Commission examinations of compliance.

(b) Beginning January 1, 1976, and each year thereafter, only independent certified public accountants, or independent licensed public accountants who were licensed on or before December 31, 1970, will be authorized to conduct annual audits and to certify to compliance in all material respects, of those schedules as are indicated in the General Instructions set out in the Annual Report, Form No. 1, with the Commission's applicable Uniform System of Accounts, published accounting releases and all other regulatory matters.

[Order 462, 37 FR 26005, Dec. 7, 1972, as amended by Order 390, 49 FR 32505, Aug. 14, 1984]

§ 41.11 Report of certification.

Each Major and Nonmajor public utility or licensee not classified as Class C or Class D prior to January 1, 1984 shall file with the Commission a letter or report of the independent accountant certifying approval, together with or within 30 days after the filing of the Annual Report, Form No. 1, covering the subjects and in the form prescribed in the General Instructions of the Annual Report. The letter or report shall also set forth which, if any, of the examined schedules do not conform to the Commission's requirements and shall describe the discrepancies that exist. The Commission shall not be bound by a certification of compliance made by an independent accountant pursuant to this paragraph.

(Sec. 304, 49 Stat. 855; 16 U.S.C. 825c)

[Order 356, 33 FR 143, Jan. 5, 1968, as amended by Order 390, 49 FR 32505, Aug. 14, 1984]

§ 41.12 Qualifications of accountants.

The Commission will not recognize any certified public accountant or public accountant through December 31, 1975, who is not in fact independent. Beginning January 1, 1976, and each year thereafter, the Commission will recognize only independent certified public accountants, or independent licensed public accountants who were licensed on or before December 31, 1970, who are in fact independent. For example, an accountant will not be considered independent with respect to any person or any of its parents or subsidiaries in whom he has, or had during the period of report, any direct financial interest. The Commission will determine the fact of independence by considering all the relevant circumstances including evidence bearing on the relationships between the accountant and that person or any affiliate thereof.

[Order 462, 37 FR 26006, Dec. 7, 1972]

PART 45—APPLICATION FOR AUTHORITY TO HOLD INTERLOCKING POSITIONS

Sec.

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; 3 CFR 142.

SOURCE: Order 141, 12 FR 8501, Dec. 19, 1947, unless otherwise noted.

CROSS REFERENCES: For rules of practice and procedure, see part 385 of this chapter. For forms under rules of practice and regulations under the Federal Power Act, see part 131 of this chapter.

§ 45.1 Applicability; who must file.

(a) This part applies to any person seeking to hold the following interlocking positions:

(1) Officer or director of more than one public utility;

(2) Officer or director of a public utility and of any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility; or

(3) Officer or director of a public utility and of any company supplying electrical equipment to a public utility.

(b) Any person seeking to hold any interlocking position described in § 45.2 of this chapter must do the following:

(1) Apply for Commission authorization under § 45.8 of this chapter; or

(2) If qualified, comply with the requirements for automatic authorization under § 45.9 of this chapter.

[Order 446, 51 FR 4904, Feb. 10, 1986]

§ 45.2 Positions requiring authorization.

(a) The positions subject to this part shall include those of any person elected or appointed to perform the duties or functions ordinarily performed by a president, vice president, secretary, treasurer, general manager, comptroller, chief purchasing agent, director or partner, or to perform any other similar executive duties or functions, in any corporation[1] within the purview of section 305(b) of the Act. With respect to positions not herein specifically mentioned which applicant holds and which are invested with executive authority, applicant shall state in the application the source of such executive authority, whether by bylaws, action of the board of directors, or otherwise.

(b) Corporations[1] within the purview of section 305(b) of the Act include:

(1) Any public utility under the Act, which means any person who owns or operates facilities for the transmission of electric energy in interstate commerce, or any person who owns or operates facilities for the sale at wholesale of electric energy in interstate commerce.

(2) Any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of public utility securities; this includes any corporation when so authorized whether or not same may also be a public utility and/or a holding company. (See 12 U.S.C. 378)

(3) Any company that supplies electrical equipment to a public utility in which applicant seeks authorization to hold a position, whether the supplying company be a manufacturer, or dealer, or one supplying electrical equipment pursuant to a construction, service, agency, or other contract.

(c) Regardless of any action which may have been taken by the Commission upon a previous application under section 305(b) of the Act, an application for approval under such section is required with reference to any position or positions not previously authorized which are within the purview of said section.

§ 45.3 Timing of filing application.

(a) The holding of positions within the purview of section 305(b) of the Act shall be unlawful unless the holding shall have been authorized by order of the Commission. Nothing in this part shall be construed as authorizing the holding of positions within the purview of section 305(b) of the Act prior to order of the Commission on application therefor. Applications must be filed and authorization must be granted prior to holding any interlocking positions within the purview of section 305(b) of the Act; late-filed applications will be denied. The term ''holding'', as used in this part, shall mean acting as, serving as, voting as, or otherwise performing or assuming the duties and responsibilities of officer or director within the purview of section 305(b) of the Act.

(b) Absent Commission action within 60 days of a completed application to hold interlocking positions, an application will be deemed granted. Such authorization is subject to revocation by the Commission after due notice to applicant and opportunity for hearing. In any such proceeding, the burden of proof shall be upon the applicant to show that neither public nor private interests will be adversely affected by the holding of such positions.

[Order 664, 70 FR 55723, Sept. 23, 2005]

§ 45.4 Supplemental applications.

(a) *New positions.* In the event of a change or changes in the information set forth in an application, by the applicant's election or appointment to

[1] *Corporation* means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include *municipalities* as defined in the Federal Power Act (sec. 3, 49 Stat. 838; 16 U.S.C. 796).

another position or other positions in corporations within the purview of section 305(b) of the Act, the application shall be supplemented by the applicant's setting forth all the data with respect to the new position or positions in accordance with the requirements of this part.

(b) *Old positions.* After applicant has been authorized to hold a particular position, further application in connection with each successive term so long as he continues in uninterrupted tenure of such position will not be required except as ordered by the Commission. If the term of office or the holding of any position for which authorization has been given shall be interrupted and the applicant shall subsequently be reelected or reappointed thereto, further authorization will be required.

§ 45.5 Supplemental information.

(a) *Required by Commission.* Applicants under this part shall upon request of the Commission and within such time as may be allowed, supplement any application or any supplemental application with any information required by the Commission.

(b) *Notice of changes.* In the event of the applicant's resignation, withdrawal, or failure of reelection or appointment in respect to any of the positions for which authorization has been granted by the Commission, or in the event of any other material or substantial change therein, the applicant shall within 30 days after any such change occurs, give notice thereof to the Commission setting forth the position corporation, and date of termination therewith, or other material or substantial change.

(c) *Reports.* All persons holding positions by authorization of the Commission under section 305(b) of the Act may be required to file such periodic or special reports as the Commission may deem necessary.

§ 45.6 Termination of authorization.

(a) *By the Commission.* Orders of authorization under section 305(b) of the Act are subject to revocation by the Commission after due notice to applicant and opportunity for hearing. In any such proceeding the burden of proof shall be upon the applicant to show that neither public nor private interests will be adversely affected by the holding of such positions.

(b) *Without action of the Commission.* Whenever a person shall cease to hold a position theretofore authorized to be held by the Commission or such position shall cease to be within the purview of section 305(b) of the Federal Power Act, the Commission's authorization to hold such position shall terminate without further action by the Commission. If upon such termination of authorization as aforesaid, such person does not continue to hold at least two positions authorized and then requiring authorization pursuant to said section 305(b) of the Act, all authorization theretofore given by the Commission shall thereupon terminate.

§ 45.7 Form of application; number of copies.

An original and two copies of each application, supplemental application, statement of supplemental information, notice of change and report required to this part, together with one additional copy for each interested State commission, shall be filed with the Commission. Each original shall be dated, signed by the applicant and verified under oath in accordance with § 131.60 of this chapter. Each copy shall bear the date and signature that appear on the original and shall be complete in itself, but the signature in the copies may be stamped or typed and the notarial seal may be omitted. The application shall conform to subpart T of part 385 of this chapter.

[Order 141, 12 FR 8501, Dec. 19, 1947, as amended by Order 225, 47 FR 19057, May 3, 1982]

§ 45.8 Contents of application; filing fee.

Each application shall be accompanied by the fee prescribed in part 381 of this chapter and shall state the following:

(a) *Identification of applicant.* (1) Full name, business address and state of residence.

(2) Major business or professional activity.

(3) If former application or applications under section 305(b) of the Act

have been made by the applicant, give date and docket number of the last application filed.

(b) *List of positions within the purview of section 305(b) of the Act for which authorization is sought.* (Indicate by asterisk positions which were the subjects of previous authorizations.)

Position	Name of corporation	Classification: (1) Public utility, (2) authorized by law to underwrite, (3) supplying electrical equipment

(c) *Data as to positions with each public utility mentioned in paragraph (b) of this section.* (The format should be adapted to the information submitted, in keeping with completeness and conciseness. In the case of public utilities of the same holding company system, brevity will generally be promoted by submitting the information for all of the utilities involved under each subsection progressively in the order of the subsections, utilizing tables when feasible.)

(1) Name of utility.

(2) Date elected or appointed, or anticipated date of election or appointment, to each position not previously authorized.

(3) Names of officers and directors; number of vacancies, if any, on Board of Directors.

(4) Description of applicant's duties: Approximate amount of time devoted thereto; and, if applicant seeks authorization as a director, the percentage of directors meetings held during the past 12 months that were attended by the applicant.

(5) All other professional, contractual, or business relationships of applicant with the public utility, either directly or through other corporations or firms.

(6) Extent of applicant's direct or indirect ownership, control of, or beneficial interest in the public utility or the securities thereof. If ownership or interest is held in a name other than that of applicant, state name and address of the holder.

(7) Extent of applicant's indebtedness to the public utility, how and when incurred, and consideration therefor.

(8) All money or property received by applicant from the public utility or any affiliate (i) during the past 12 months, and expected during the ensuing 12 months, or (ii) during the public utility's most recently ended fiscal year, and expected during the public utility's current fiscal year, or (iii) during the past and current calendar years, whether for services, reimbursement for expenses, or otherwise. Specify in detail the amount thereof and the basis therefor. If applicant's compensation for services to the public utility is not paid directly by the public utility, give name of the corporation that does pay same, the amount allocated or allocable to the public utility or any affiliate, and the basis or reason for such allocation.

(9) Whether during the past 5 years the public utility or any affiliate thereof or any security holders of either have commenced any suit against the officers or directors thereof for alleged waste, mismanagement or violation of duty, to which suit applicant was a party defendant. If so, give date of commencement of suit, court in which commenced, and present status.

(d) *Data as to positions with each bank, trust company, banking association or firm, mentioned in paragraph (b) of this section, that is authorized by law to underwrite or participate in the marketing of securities of a public utility.* (The applicant shall use a separate sheet for each corporation.)

(1) Name of corporation and address of principal place of business.

(2) Positions which applicant holds or seeks authorization to hold therein and when and by whom elected or appointed to each position.

(3) Description of applicant's duties in each position and the approximate amount of time devoted thereto, and, if applicant seeks authorization as director, the percentage of directors meetings held during the past 12 months that were attended by the applicant.

(4) Extent of applicant's direct or indirect ownership, or control of, or beneficial interest in, the company or in the securities thereof, including common stock, preferred stock, bonds, or other securities. If such ownership or interest is held in a name other than

that of applicant, state name and address of such holder.

(5) All money or property received by applicant from the company (i) during the past 12 months, and expected during the ensuing 12 months, or (ii) during the company's most recently ended fiscal year, and expected during the company's current fiscal year, or (iii) during the past and current calendar years, whether for services, reimbursement for expenses, or otherwise. Specify in detail the amount thereof and the basis therefor.

(6) Names and titles of directors, officers, or partners.

(7) Whether the corporation is now engaged in underwriting or participating in the marketing of the securities of a public utility; if so, to what extent.

(8) Whether the corporation, during applicant's connection therewith, has underwritten or participated in the marketing of the security issue of any public utility with which applicant was also connected; if so, the details with respect to every such transaction that occurred during the past 36 months.

(9) (If the answer to paragraph (d)(7) of this section is in the negative.) Give excerpts from the charter, declaration of trust, or articles of partnership that authorize the underwriting or participating in the marketing of securities of a public utility.

(10) (If the answer to paragraph (d)(7) of this section is in the negative.) Give general requirements of and appropriate reference to, the laws of the State of organization and of States in which corporation is doing business or has qualified to do business, with which it must comply in order to engage in the business of underwriting or participating in the marketing of the securities of a public utility.

(11) What steps, if any, have been taken to comply with laws mentioned in paragraph (d)(10) of this section.

(12) In lieu of paragraphs (d)(9), (10), and (11) of this section, an opinion by counsel to the same effect and including the information in respect thereto may be filed with the application.

(13) Whether the corporation has registered with the Securities and Exchange Commission; if so, when and under what section of what act.

(e) *Data as to positions with each company, mentioned in paragraph (b) of this section, supplying electrical equipment to a public utility in which applicant holds a position.* (Applicant shall use a separate sheet for each company.)

(1) Name of company and address of principal place of business.

(2) Positions which applicant holds or seeks authorization to hold therein and when and by whom elected or appointed to each position.

(3) Description of applicant's duties in each position and approximate amounts of time devoted thereto, and, if applicant seeks authorization as director, the percentage of directors meetings held during the past 12 months that were attended by the applicant.

(4) Names and titles of directors or partners.

(5) Name of each public utility, with which applicant holds or seeks authorization to hold a position, to which the company supplies electrical equipment; the frequency of such transactions; the approximate annual dollar volume of such business; and the type of equipment supplied.

(6) Nature of relationship between the company supplying electrical equipment and the public utility:

(i) Whether company manufactures such electrical equipment or is a dealer therein.

(ii) Whether company supplies electrical equipment to the public utility pursuant to construction, service, agency, or other contract with the public utility or an affiliate thereof, and, if so, furnish brief summary of the terms of such contract.

(7) Extent of applicant's direct or indirect ownership, or control of, or beneficial interest in, the company or in the securities thereof, including common stock, preferred stock, bonds, or other securities. If such ownership or interest is held in a name other than that of applicant, state name and address of such holder.

(8) All money or property received by applicant from the company (i) during the past 12 months, and expected during the ensuing 12 months, or (ii) during the company's most recently ended fiscal year, and expected during the company's current fiscal year, or (iii)

during the past and current calendar years, whether for services, reimbursement for expenses, or otherwise. Specify in detail the amount thereof and the basis therefor.

(f) *Data as to positions with public utility holding companies.* (Do not include here data as to corporations listed in paragraph (b) of this section which are also holding companies. A *holding company* as herein used means any corporation which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more, of the outstanding voting securities of a public utility.)

(1) Name of holding company and address of principal place of business.

(2) Positions which applicant holds therein, when and by whom elected or appointed to each position.

(3) Extent of applicant's direct or indirect ownership, or control of, or beneficial interest in, the holding company or in the securities thereof, including common stock, preferred stock, bonds, or other securities. If such ownership or interest is held in a name other than that of applicant, state name and address of such holder.

(4) All money or property received by applicant from the holding company (i) during the past 12 months, and expected during the ensuing 12 months, or (ii) during the holding company's most recently ended fiscal year, and expected during the holding company's current fiscal year, or (iii) during the past and current calendar years, whether for services, reimbursement for expenses, or otherwise. Specify in detail the amount thereof and the basis therefor.

(g) *Positions with all other corporations.* (Do not include here data that have been filed within the past 12 months in FERC–561, pursuant to part 46 of this chapter, or data as to any corporations listed in paragraph (b) or (f) of this section.)

(1) All other corporations and positions therein, including briefly the information required in parallel columns as below:

Name of corporation	Address: Kind of business	Position held therein

(2) Any corporate, contractual, financial, or business relationships between any of the corporations listed in paragraph (g)(1) of this section and any of the public utilities listed in paragraph (b) of this section.

(h) *Data as to the public utility holding company system.* The names of the public utility holding company systems of which each public utility listed in paragraph (b) of this section is a part, with a chart showing the corporate relationships existing between and among the corporations within the holding company systems.

[Order 246, 27 FR 4912, May 25, 1962, as amended by Order 427, 36 FR 5598, Mar. 25, 1971; Order 374, 49 FR 20479–20480, May 15, 1984; Order 435, 50 FR 40358, Oct. 3, 1985]

CROSS REFERENCE: For rules and regulations of the Securities and Exchange Commission, see 17 CFR, chap. II.

§ 45.9 Automatic authorization of certain interlocking positions.

(a) *Applicability.* Subject to paragraphs (b) and (c) of this section, the Commission authorizes any officer or director of a public utility to hold the following interlocking positions:

(1) Officer or director of one or more other public utilities if the same holding company owns, directly or indirectly, that percentage of each utility's stock (of whatever class or classes) which is required by each utility's bylaws to elect directors;

(2) Officer or director of two public utilities, if one utility is owned, wholly or in part, by the other and, as its primary business, owns or operates transmission or generating facilities to provide transmission service or electric power for sale to its owners; and

(3) Officer or director of more than one public utility, if such officer or director is already authorized under this part to hold different positions as officer or director of those utilities where the interlock involves affiliated public utilities.

(b) *Conditions of authorization.* As a condition of authorization, any person

authorized to hold interlocking positions under this section must submit, prior to performing or assuming the duties and responsibilities of the position, an informational report in accordance with paragraph (c) of this section, unless that person is already authorized to hold interlocking positions of the type governed by this section. Failure to timely file the informational report will constitute a failure to satisfy this condition, and will constitute automatic denial.

(c) *Informational report.* An informational report required under paragraph (b) of this section must state:

(1) The full name and business address of the person required to submit this report;

(2) The names of all public utilities with which the person holds or will hold the positions of officer or director and a description of those positions;

(3) The names of any entity, other than those listed in paragraph (c)(2) of this section, of which the person is an officer or director and a description of those positions; and

(4) An explanation of the corporate relationship between or among the public utilities listed in paragraph (c)(2) of this section which qualifies the person for automatic authorization under this section.

(5) A statement or an affirmation that the applicant has not yet performed or assumed the duties or responsibilities of the position which necessitated the filing of this informational report.

[Order 446, 51 FR 4905, Feb. 10, 1986, as amended by Order 664, 70 FR 55723, Sept. 23, 2005]

PART 46—PUBLIC UTILITY FILING REQUIREMENTS AND FILING REQUIREMENTS FOR PERSONS HOLDING INTERLOCKING POSITIONS

Sec.

AUTHORITY: Federal Power Act, as amended, (16 U.S.C. 792–828c); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601–2645; Department of Energy Organization Act, (42 U.S.C. 7101–7352); E.O. 12009, 3 CFR 142 (1978).

SOURCE: 45 FR 23418, Apr. 7, 1980, unless otherwise noted.

§ 46.1 Purpose.

The purpose of this part is to implement section 305(c) of the Federal Power Act, as amended by section 211 of the Public Utility Regulatory Policies Act of 1978.

[Order 67, 45 FR 3569, Jan. 18, 1980]

§ 46.2 Definitions.

For the purpose of this part:

(a) *Public utility* has the same meaning as in section 201(e) of the Federal Power Act and further includes any company which is part of a holding company system which includes a registered holding company unless no company in such system is an electric utility within the meaning of section 3 of the Federal Power Act. Such term does not include any rural electric cooperative which is regulated by the Rural Electrification Administration of the Department of Agriculture or any other entities covered in section 201(f) of the Federal Power Act.

(b) The following terms have the same meaning as in the Public Utility Holding Company Act of 1935:

(1) Holding company system; and

(2) Registered holding company.

(c) *Purchaser* means any individual or corporation within the meaning of section 3 of the Federal Power Act who purchases electric energy from a public utility. Such term does not include the United States or any agency or instrumentality of the United States or any rural electric cooperative which is regulated by the Rural Electrification Administration of the Department of Agriculture.

(d) *Control* and *controlled* mean the possession, directly or indirectly, of the power to direct the management or policies of an entity whether such power is exercised through one or more intermediary companies or pursuant to an agreement, written or oral, and whether such power is established

through ownership or voting of securities, or common directors, officers, or stockholders, or voting trusts, holding trusts, or debt holdings, or contract, or any other direct or indirect means. A rebuttable presumption that control exists arises from the ownership or the power to vote, directly or indirectly, ten percent (10%) or more of the voting securities of such entity.

(e) *Entity* means any firm, company, or organization including any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. Such term does not include *municipality* as defined in section 3 of the Federal Power Act and does not include any Federal, State, or local government agencies or any rural electric cooperative which is regulated by the Rural Electrification Administration of the Department of Agriculture.

(f) *Electrical equipment* means any apparatus, device, integral component, or integral part used in an activity which is electrically, electronically, mechanically, or by legal prescription necessary to the process of generation, transmission, or distribution of electric energy.[1]

[1]Guidance in applying the definition of *electrical equipment* may be obtained by examining the items within the following accounts described in part 101, title 18 of the Code of Federal Regulations: Boiler/Reactor plant equipment (Accounts 312 and 322); Engines and engine driven generators (313); Turbogenerator units (314 and 323); Accessory electrical equipment (315, 324, 334 and 345); Miscellaneous power plant equipment (316, 325, 335 and 346); Water wheels, turbines and generators (333); Fuel holders, producers, and accessories (342); Prime movers (343); Generators (344); Station equipment (353 and 362); Poles, towers and fixtures (354, 355 and 364); Overhead conductors and devices (356 and 365); Underground conduit (357 and 366); Underground conductors and devices (358 and 367); Storage battery equipment (363); Line transformers (368); Services (369); Meters (370); Installation on customers' premises (371); Street lighting and signal systems (373); Leased property on customers' premises (372); and Communication equipment (397). Excepted from these accounts, are vehicles, structures, foundations, settings, and services.

(g) *Produces or supplies* means any transaction including a sale, lease, sale-leaseback, consignment, or any other transaction in which an entity provides electrical equipment, coal, natural gas, oil, nuclear fuel, or other fuel to any public utility either directly or through an entity controlled by such entity.

(h) *Appointee* means any person appointed on a temporary or permanent basis to perform any duties or functions described in § 46.4(a).

(i) *Representative* means any person empowered, through oral or written agreement, to transact business on behalf of an entity and any person who serves as an advisor regarding policy or management decisions of the entity. The term does not include attorneys, accountants, architects, or any other persons who render a professional service on a fee basis.

§ 46.3 Purchaser list.

(a) *Compilation and filing list.* On or before January 31 of each year, each public utility shall compile a list of the purchasers described in paragraph (b) of this section and shall identify each purchaser by name and principal business address. An original and two (2) copies of such list shall be filed with the Commission by the public utility and the list shall be made publicly available through its principal business office.

(b) *Largest purchasers.* The list required under paragraph (a) of this section shall include each purchaser who, during any of the three (3) preceding calendar years, purchased (for purposes other than resale) from a public utility one of the twenty (20) largest amounts of electric energy measured in kilowatt hours sold (for purposes other than resale) by such utility during such year.

(c) *Special rules.* If data for actual annual sales (for purposes other than resale) are not available in the records of the public utility, the utility may use estimates based on actual data available to it. If one purchaser maintains several billing accounts with the public utility, the kilowatt hours purchased in each account of that purchaser shall be aggregated to arrive at the total for that purchaser.

(d) *Notification of largest purchasers.* Each public utility shall notify by January 31 of each year each purchaser which has been identified on the list of largest purchasers under paragraph (b) of this section.

(e) *Revision of the list.* Each public utility relying upon any estimates for its January 31st filing, shall revise the list compiled under paragraph (b) of this section no later than March 1 of the year in which the list was originally filed to reflect actual data not available to the utility prior to that time. Any revised list shall be filed with the Commission and made publicly available through the utility's principal business office no later than March 1. A utility filing a revised list shall indicate thereon the changes made to the list previously filed under paragraph (b) of this section. On or before the filing and publication of the revised list, the public utility shall notify the newly-listed purchasers and any purchasers whose names were removed from the list.

[Order 67, 45 FR 3569, Jan. 18, 1980; 45 FR 6377, Jan. 28, 1980]

§ 46.4 General rule.

A person must file with the Office of the Secretary of the Commission a written statement in accordance with § 46.6, and in the form specified in § 131.31 of this chapter (except that with respect to calendar year 1980, no filings in the form specified in § 131.31 is required if such person has previously filed the statement required for calendar year 1980 in a different form than specified in § 131.31), if such person:

(a) Serves for a public utility in any of the following positions: A director or a chief executive officer, president, vice president, secretary, treasurer, general manager, comptroller, chief purchasing agent, or any other position in which such person performs similar executive duties or functions for such public utility; and

(b) Serves for any entity described in § 46.5 in any of the positions described in paragraph (a) of this section or is a partner, appointee, or representative of such entity.

[45 FR 23418, Apr. 7, 1980, as amended by Order 140, 46 FR 22181, Apr. 16, 1981]

§ 46.5 Covered entities.

Entities to which the general rule in § 46.4(b) applies are the following:

(a) Any investment bank, bank holding company, foreign bank or subsidiary thereof doing business in the United States, insurance company, or any other organization primarily engaged in the business of providing financial services or credit, a mutual savings bank, or a savings and loan association;

(b) Any entity which is authorized by law to underwrite or participate in the marketing of securities of a public utility;

(c) Any entity which produces or supplies electrical equipment or coal, natural gas, oil, nuclear fuel, or other fuel, for the use of any public utility;

(d) Any entity specified in § 46.3;

(e) Any entity referred to in section 305(b) of the Federal Power Act; and

(f) Any entity which is controlled by any entity referred to in this section.

§ 46.6 Contents of the written statement and procedures for filing.

Each person required to file a written statement under the general rule in § 46.4 shall comply with the following requirements:

(a) Each person shall provide the following information: full name and business address; identification of the public utilities and the covered entities in which such person holds executive positions described in § 46.4; and identification of the interlock described in § 46.4;

(b) If the interlock is between a public utility and an entity described in § 46.5(c), which produces or supplies electrical equipment for use of such public utility, such person shall provide the following information:

(1) The aggregate amount of revenues received by such entity from producing or supplying electrical equipment to such public utility in the calendar year specified in paragraph (d) of this section, rounded up to the nearest $100,000; and

(2) The nature of the business relationship between such public utility and such entity.

(c) If the person is authorized by the Commission to hold the positions of officer or director in accordance with

part 45, such person shall identify the authorization by docket number and shall give the date of authorization.

(d)(1) Each person shall file an original and one copy of such written statement with the Office of Secretary of the Commission on or before April 30 of each year immediately following the calendar year during any portion of which such person held a position described in § 46.4. The original of such statement shall be dated and signed by such person. The copy shall bear the date that appeared on the original; the signature on the copy may be stamped or typed on the copy.

(2) Instead of submitting changes to the Commission on the pre-printed Form No. 561 sent annually by the Commission, a person may choose to make changes to the pre-filled electronic version provided by the Commission. This electronic version, along with the signed original and one copy (as required by Paragraph (d)(c)) shall also be filed with the Commission.

(3) Such statement shall be available to the public during regular business hours through the Commission's Office of Public Information and shall be made publicly available through the principal business offices of the public utility and any entity to which it applies on or before April 30 of the year the statement was filed with the Commission.

(Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[45 FR 23418, Apr. 7, 1980, as amended by Order 601, 63 FR 72169, Dec. 31, 1998]